

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



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BRIEF AND APPENDIX FOR PETITIONER AND  
JOINT APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

—  
No. 17,706  
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839

POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

vs.

N. E. HALABY, Administrator of the Federal Aviation  
Agency, *Respondent*

(IRVIN R. and FRANCES M. RODENHAUSER, *Intervenors*).

—  
On Petition for Review of Order of the Administrator  
of the Federal Aviation Agency  
—

United States Court of Appeals

for the District of Columbia Circuit

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CLERK  
June 17, 1963.

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### **STATEMENT OF QUESTIONS PRESENTED**

1. Whether a determination by the Respondent Administrator that certain power lines, proposed to be constructed by the Petitioner on its fee-owned property adjacent to a privately owned and operated airport, would constitute a hazard to air navigation adversely affects the Petitioner and hence is reviewable by this Court.

2. If the determination is so reviewable, whether the Administrator had statutory authority to make the determination.

3. If the determination is so reviewable and if the Administrator had such authority, whether such authority could constitutionally be exercised by the Administrator.

4. If the determination is so reviewable, if the Administrator had such authority, and if he could constitutionally exercise it, whether that authority could lawfully be exercised without affording the Petitioner an opportunity to present evidence as to the respective public interests, if any, involved in the airport and in the Petitioner's power lines, and without the Administrator making findings, supported by substantial evidence of record, as to the efficient utilization of the navigable airspace.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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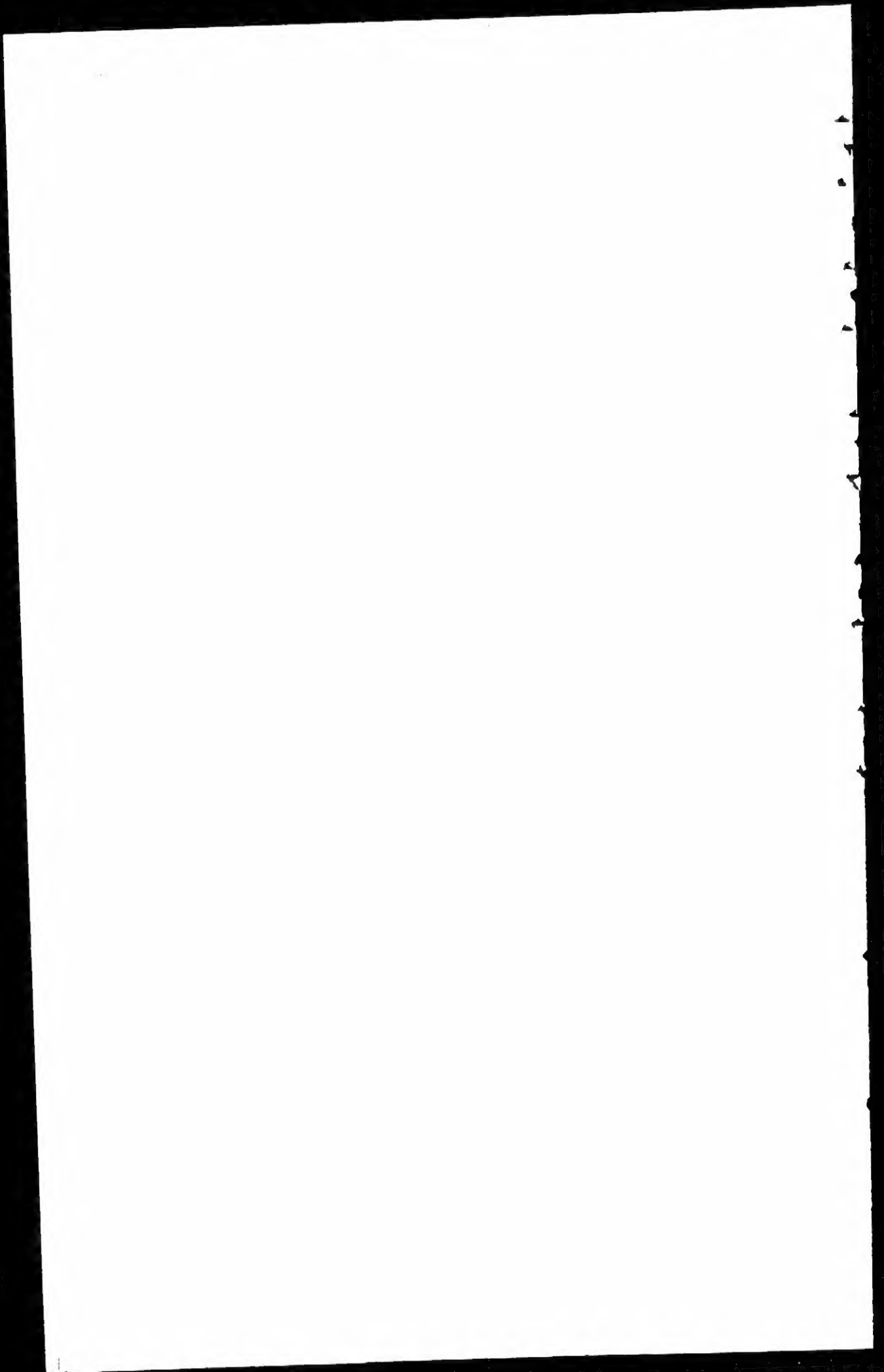
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## TABLE OF CONTENTS

	Page
STATEMENT OF QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES	
Cases .....	iii
Constitution of the United States .....	iii
Statutes .....	iii
Regulations and Notices of the Federal Aviation Agency .....	iv
Congressional Hearings and Reports .....	v
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE CASE .....	1
STATUTES AND REGULATIONS .....	7
STATEMENT OF POINTS .....	7
SUMMARY OF ARGUMENT .....	7
ARGUMENT:	
I. The Determination is reviewable because it might adversely affect Pepco, unless it is made clear, by revision of the Determination or by judicial pronouncement, that it cannot so operate	9
1. The effect of the Determination on Pepco is in doubt .....	9
2. Its effect being in doubt, it is possible that the Determination might operate to affect Pepco adversely .....	16
3. If the Determination adversely affects Pepco, it is reviewable. If such effect is not intended, the possibility of adverse effect should be avoided by a revision of the language of the Determination or by a judicial pronouncement making clear that it cannot have adverse effect on Pepco .....	18

	Page
II. If the Determination adversely affects Pepco, its issuance exceeded the statutory authority of the Administrator .....	20
1. The Act does not vest the Administrator with power to assign the use of navigable airspace by non-aeronautical structures .....	20
(1) The language of the Act .....	22
(2) The legislative history of the Act .....	25
2. Airspace required for landings and takings-off at Freeway Airport is not "navigable airspace" and hence its use is not subject to assignment by the Administrator .....	29
3. Pepco's proposed structures will not affect "air commerce" and hence the Determination is beyond the Administrator's statutory authority .....	34
III. The Determination, if it adversely affects Pepco and is not in excess of the Administrator's statutory authority, is invalid because issued in violation of the Fifth Amendment to the Constitution .....	35
IV. The Determination, if it adversely affects Pepco and is not in excess of the Administrator's statutory and constitutional authority, is invalid because Pepco was not permitted to present evidence, and the Administrator made no finding, with respect to the efficient utilization of the concerned airspace .....	38
CONCLUSION .....	43
PETITIONER'S APPENDIX (with table of contents)	
JOINT APPENDIX (with table of contents)	

## TABLE OF AUTHORITIES

	Page
<b>CASES:</b>	
Atchison, T. & S. F. R. Co. v. United States (1935), 295 U.S. 193, 79 L. ed. 1382, 55 S. Ct. 748 .....	35
Cline v. Kansas Gas & Elec. Co. (10th Cir. 1958), 260 F. 2d 271 .....	32
Frozen Food Express v. United States (1956), 351 U.S. 40, 100 L. ed. 910, 76 S. Ct. 569 .....	19
* Griggs v. Allegheny County (1962), 369 U.S. 84, 7 L. ed. 2d 585, 82 S. Ct. 531 .....	21, 29, 30, 31, 33, 35
Joint Anti-Fascist Refugee Comm. v. McGrath (1951), 341 U.S. 123, 95 L. ed. 817, 71 S. Ct. 624 .....	19
La Com v. Pacific Gas & Elec. Co. (Dist. Ct. App. 1955), 132 Cal. App. 2d 114, 281 P. 2d 894 .....	18
Madisonville Traction Co. v. St. Bernard Mining Co. (1905), 196 U.S. 239, 49 L. ed. 462, 25 S. Ct. 251 ..	32
Panama Refining Co. v. Ryan (1935), 293 U.S. 388, 79 L. ed. 446, 55 S. Ct. 241 .....	35
Strother v. Pacific Gas & Elec. Co. (Dist. Ct. App. 1949), 94 Cal. App. 2d 525, 211 P. 2d 624 .....	18
United States v. Causby (1946), 328 U.S. 256, 90 L. ed. 1206, 66 S. Ct. 1062 .....	21, 37
United States v. Los Angeles & S. L. R. Co. (1927), 273 U.S. 299, 71 L. ed. 651, 47 S. Ct. 413 .....	19
Yonkers v. United States (1944), 320 U.S. 685, 88 L. ed. 400, 64 S. Ct. 327 .....	35
 <b>CONSTITUTION OF THE UNITED STATES:</b>	
* Amendment V .....	7, 8, 33, 35, 36, 38
 <b>STATUTES:</b>	
Civil Aeronautics Act of 1938, § 302, 52 Stat. 973, 985 (June 23, 1938), as amended (repealed) .....	27
Federal Airport Act of 1946, 60 Stat. 170 (May 13, 1946), as amended, 49 U.S.C.A. §§ 1101-1119 ....	30, 31
§ 13, 60 Stat. 177, as amended, 49 U.S.C.A. § 1112 .....	30

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\* Cases or authorities chiefly relied upon are marked by asterisks.

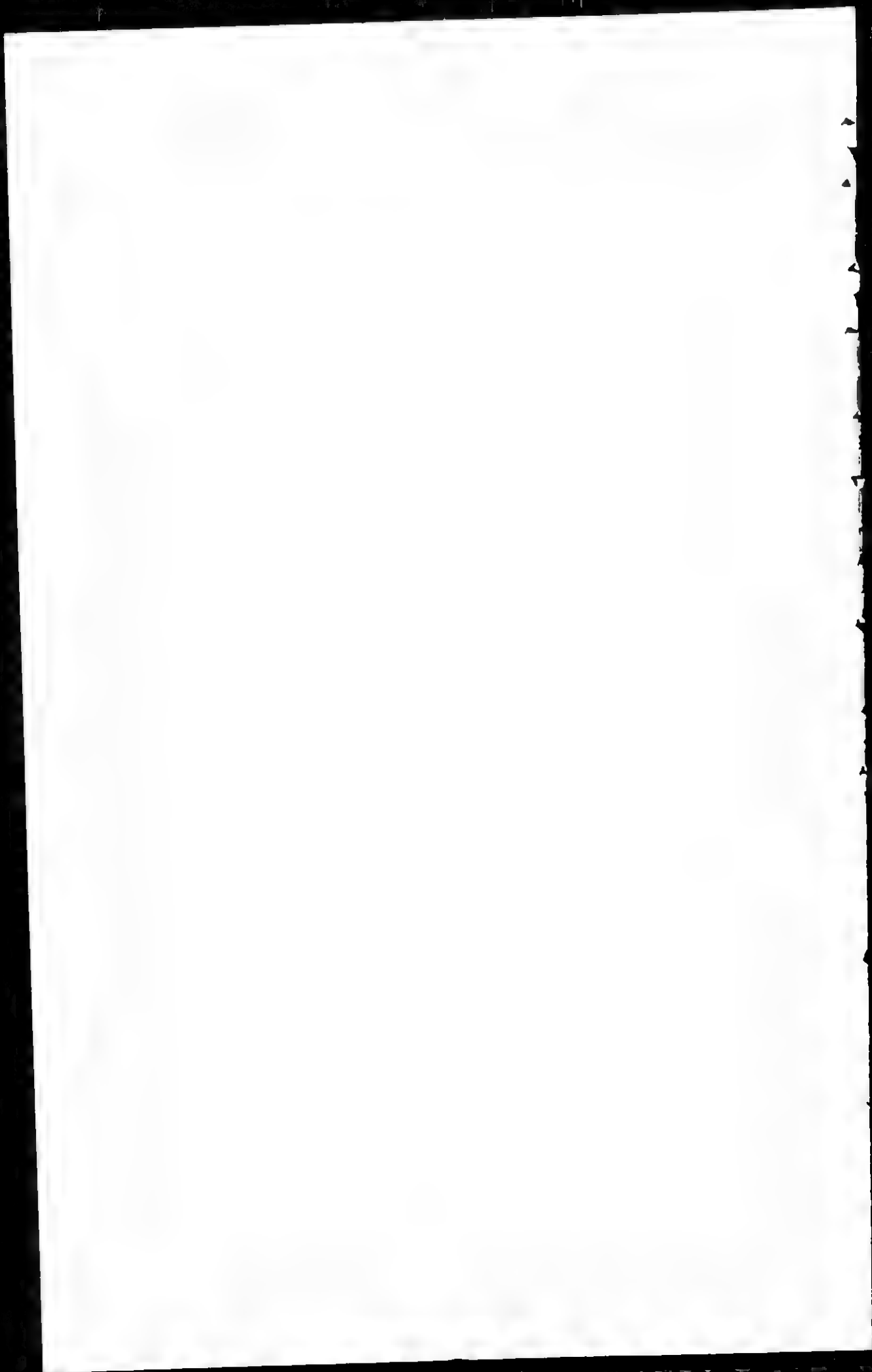
	Page
International Aviation Facilities Act of 1948, 62 Stat. 450 (June 16, 1948), as amended, 49 U.S.C.A. §§ 1151-1160 .....	32
Act of June 25, 1948, c. 646, § 1491, 62 Stat. 940, as amended, 28 U.S.C.A. § 1491 .....	37
*Federal Aviation Act of 1958, 72 Stat. 731 (August 23, 1958), as amended, 49 U.S.C.A. §§ 1301-1542 .....1, 22	
§ 101, 72 Stat. 737, as amended, 49 U.S.C.A. § 1301 .....	16, 29, 34
§ 103, 72 Stat. 740, 49 U.S.C.A. § 1303 .....	22
§ 104, 72 Stat. 740, 49 U.S.C.A. § 1304 .....	9, 16, 29
§ 301, 72 Stat. 744, 49 U.S.C.A. § 1341 .....	21, 22
§ 302, 72 Stat. 744, 49 U.S.C.A. § 1342 .....	21
§ 303, 72 Stat. 747, 49 U.S.C.A. § 1344 .....	22, 33, 37
§ 305, 72 Stat. 749, 49 U.S.C.A. § 1346 .....	16, 23
• § 307, 72 Stat. 749, 49 U.S.C.A. § 1348 ... 8, 9, 14, 16, 20, 23, 26, 27, 29, 33, 38, 41	
§ 308, 72 Stat. 750, 49 U.S.C.A. § 1349 .... 24, 30, 31, 32, 33, 35, 37	
§ 309, 72 Stat. 751, 49 U.S.C.A. § 1350 .....	24, 31
§ 312, 72 Stat. 751, 49 U.S.C.A. § 1353 .....	24
§ 313, 72 Stat. 752, 49 U.S.C.A. § 1354 .....	9
§ 1001, 72 Stat. 788, 49 U.S.C.A. § 1481 .....	9
§ 1006, 72 Stat. 795, as amended, 49 U.S.C.A. § 1486 .....	1
§ 1101, 72 Stat. 797, 49 U.S.C.A. § 1501 ... 9, 14, 17, 34	
 REGULATIONS AND NOTICES OF THE FEDERAL AVIATION AGENCY:	
Federal Aviation Agency, Regulations, Part 626— <i>Notice of Construction or Alteration</i> , 26 F.R. 5287 (1961), as amended (superseded, December 12, 1962) .....	1, 9, 14, 16, 17, 20, 43
• Preamble .....	9, 10, 11, 14, 17
§ 626.1 .....	12
§ 626.12 .....	6
§ 626.13 .....	3

\* Cases or authorities chiefly relied upon are marked by asterisks.

# Table of Authorities Continued

v

	Page
§ 626.33 .....	1, 40
§ 626.34 .....	1, 5, 6
§ 626.50, as amended .....	14
§ 626.51 .....	12, 15
Federal Aviation Agency, Regulations, Part 77— <i>Notice of Construction or Alteration Affecting</i> <i>Navigable Airspace</i> , § 77.37, 14 C.F.R. § 77.37 (effective December 12, 1962) .....	40
Federal Aviation Agency, Miscellaneous Amendments to Part 626 of Regulations, Preamble, 26 F.R. 8171 (1961) .....	13, 14
Federal Aviation Agency, Notice of Proposed Rule Making, Preamble, 25 F.R. 8911 (1960) .....	9, 12, 39
CONGRESSIONAL HEARINGS AND REPORTS:	
Hearings on H.R. 12616 Before a Subcommittee of the House Committee on Interstate and Foreign Com- merce, 85th Cong., 2d Sess. (1958) .....	28
Hearings on S. 3880 Before the Subcommittee on Aviation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958) .....	28
H.R. Report No. 2360, 85th Cong., 2d Sess. (1958) ...	26
S. Report No. 1811, 85th Cong., 2d Sess. (1958) ..	20, 25, 26



## **JURISDICTIONAL STATEMENT**

This is an appeal by Potomac Electric Power Company ("Pepco") to review a "Determination of Hazard to Air Navigation" (the "Determination") issued by the Administrator of the Federal Aviation Agency (the "Administrator") pursuant to Regulations (PA 24)\* promulgated by the Administrator allegedly under authority conferred on him by the Federal Aviation Act of 1958 (the "Act", Act of Aug. 23, 1958, PL 85-726, 72 Stat. 731, 49 USC §§ 1301-1542).

The Determination (JA 17)\*\* was issued on October 19, 1962 and on November 16, 1962, being a date within 30 days of such date of issuance, as required by Secs. 626.33 and 626.34 of the Regulations (PA 35 and 36) in order to prevent the Determination from becoming "final", Pepco filed with the Administrator a petition for a public hearing (JA 19). Subsequently, by letter dated February 1, 1963 (JA 26), Pepco was advised by the Deputy Administrator that such petition was denied. Under Sec. 626.33 of the Regulations (PA 35), the Determination became "final" upon such denial.

With one non-relevant exception, Sec. 1006(a) of the Act (PA 14) provides that any order issued by the Administrator is subject to review by this Court.

## **STATEMENT OF THE CASE**

On or about December 27, 1961, Pepco filed with the Administrator a notice (JA 2) of its proposed construction, on property owned in fee by Pepco, of certain above-ground electric transmission facilities adjacent to

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\* Throughout this brief page references to the Petitioner's Appendix, below, are made in this manner.

\*\* Throughout this brief page references to the Joint Appendix, below, are made in this manner.

the Freeway Airport, a privately owned and operated airport for light aircraft located in Prince George's County, Maryland. At the time Pepco filed such notice with the Administrator, the Freeway Airport had not obtained "airspace clearance" from the Administrator (JA 4). Pepco now understands that no such clearance has been given the airport, on the ground that its operations allegedly antedated the requirement of such clearance. Pepco was not given any opportunity to be heard with respect to such alleged antedating.

Pepco is a regulated electric utility doing business in the District of Columbia, Maryland and Virginia and is the sole supplier of electric power and energy to the public (including most of the buildings, installations and facilities of the Federal government) in a large portion of the Washington metropolitan area (JA 19). It is now, and throughout the proceedings under review has been, engaged in constructing a new steam-electric generating station at Chalk Point in the extreme southeasterly corner of Prince George's County, Maryland (JA 21).

The above-ground electric transmission facilities which Pepco proposes to construct adjacent to Freeway Airport will be part of a 230,000 volt transmission line connecting the new Chalk Point Generating Station (expected to go into commercial operation in the Spring of 1964) with the rest of Pepco's power supply system. Pepco's study to fix the route of such transmission line began in the Fall of 1956. By mid-1958 such route (including the portion of the right-of-way in the vicinity of Freeway Airport) had been largely determined (using aerial photographs which gave no indication of any airport operation on the property which is now the site of Freeway Airport), and by November 19, 1960 all but one of the necessary property acquisitions in the vicinity of the airport had been completed. The final such acquisition was completed on May 9, 1961 (JA 21).

The location, construction, maintenance and operation of such transmission line, including the portion thereof to be constructed in the vicinity of Freeway Airport, are essential to the performance by Pepco of its public utility obligations and essential to the furnishing of adequate electric service to the Washington metropolitan area, including the many governmental buildings, installations and facilities located therein (JA 22).

Following the filing with the Administrator of the notice of its proposed construction, Pepco was advised by the Federal Aviation Agency (the "FAA"), by letter dated February 16, 1962 (JA 4), that the heights of the proposed structures "exceed the criteria of hazards to air navigation in Part 626.13(a)(1) and (b)(2)" of the Regulations (PA 31) and that, consequently, a preliminary determination had been made that the proposed construction would constitute a "hazard to air navigation". The letter further advised Pepco that such preliminary determination would become "final" unless Pepco requested "an *aeronautical* study" (emphasis supplied).

Accordingly, Pepco requested such an aeronautical study by letter dated March 5, 1962 (JA 6). Under date of March 14, 1962, the FAA addressed a memorandum to "All Interested Parties" (JA 7), stating that it had been asked "to determine the effect on *aeronautical activity* which may be created by the . . . proposed construction" (emphasis supplied) and asking that anyone wishing to interpose objections to the proposal file "a separate letter setting forth valid *aeronautical* reasons" (emphasis supplied).

Under date of April 26, 1962 the FAA addressed a memorandum to "All Participants, FAA Airspace Meeting" distributing the agenda for an "Informal FAA Airspace Meeting" to be held on May 15, 1962. Such memorandum (JA 14) said "These meetings give *aviation interests* the opportunity to comment on agenda items proposed for

formal airspace action" (emphasis supplied), and the accompanying agenda item with respect to Pepco's proposed construction (JA 15) said that the FAA "is conducting an *aeronautical* study to determine the effects on airspace utilization" (emphasis supplied) of the Pepco proposal, that the proposal had been circularized "for *aeronautical* comment" (emphasis supplied), and that "*Aeronautical* objections" (emphasis supplied) had been made in response to the circularization (presumably referring to the letters and memoranda appearing at JA 10 through 14).

Subsequently, on May 15, 1962, such "informal airspace meeting" was held by the FAA with the last item discussed being Pepco's proposed construction. A Pepco representative attended and during the course of the meeting it was made clear that the meeting was concerned only with consideration of the possible effect of the proposed construction on aeronautical activities (JA 16).

On October 19, 1962, the Administrator, acting through the Acting Chief of the Obstruction Evaluation Branch of the FAA, issued the Determination (JA 17) of which review is sought in this proceeding. The Determination, after an opening statement to the effect that the Agency had "circularized [Pepco's] proposal for *aeronautical* comment" (emphasis supplied) and had "conducted a study to determine its effect upon the safe and efficient utilization of airspace", found that the proposed structures would render certain Freeway Airport runways unusable, or less useful, and "would have a substantial adverse effect upon aeronautical operations at the Freeway Airport", and determined "that the proposed structure would be a hazard to air navigation". The Determination made no findings whatsoever with respect to the nature of the operations conducted at Freeway Airport, with respect to the public interests involved in the construction of Pepco's proposed facilities and in the operation of the airport, with respect to the relative importance of such

public interests, or with respect to the efficient utilization of airspace.

The Determination also stated (JA 18) that it was "effective" as of its date of issuance and would become "final" 30 days after its issuance unless an appeal were filed under Sec. 626.34 of the Regulations (PA 35), and that, if such an appeal were filed and denied, it would become "final" as of the date of the denial or 30 days after the issuance of the Determination, whichever was later.

On November 16, 1962, Pepco filed with the Administrator, pursuant to such Sec. 626.34, a Petition for Public Hearing (JA 19). Such Petition recited the pertinent facts with respect to Pepco's proposed construction and the public interest therein, and alleged that

"The location, construction, maintenance and operation of said steel tower transmission lines, including the portions thereof in the vicinity of said Freeway Airport, is [sic] essential to the performance by the Petitioner of its public utility obligations, and essential to the furnishing of adequate electric service to the Washington Metropolitan Area, including the many governmental buildings, installations and facilities located therein" (JA 22)

as well as that

"The . . . Determination made no finding or determination as to what action should be taken for the protection of persons and property on the ground or as to what, in the public interest, would be the most efficient utilization of the navigable airspace above the Petitioner's said 250 foot wide right-of-way in the vicinity of said Freeway Airport, and in the making of said Determination no consideration was given to the large public interest affecting the Petitioner's operation as a public utility or to the essential public service nature of the facilities proposed to be constructed, maintained and operated by the Petitioner on its said right-of-way" (JA 23).

The Petition closed with a prayer that a public hearing be conducted on Pepco's proposed construction, pursuant to the Regulations,

"in order to determine, in the light of the over-all public interest, the effect of the proposed construction upon the safety of aircraft and, even more importantly, upon the efficient utilization of the navigable airspace" (JA 23).

On or about November 28, 1962, counsel for the Intervenor proprietors of the Freeway Airport filed with the Administrator an "Answer to Petition for Public Hearing" (JA 24) in which it was asserted that Pepco's Petition "does not show an adequate foundation . . . and such hearing should be denied until an adequate petition is filed", citing Sec. 626.34 of the Regulations (PA 35). Such Answer further stated that

"Unless in some way the proponent [i.e. Pepco] alleges that the results and conclusions reached by the Agency are in error, by alleging that the proposed structures would not violate any of the criteria of 626.12, or that notwithstanding violation of such criteria, such construction would not constitute a hazard, the petition for public hearing does not have adequate foundation, and the hearing should be denied" (JA 25).

Finally, by letter dated February 1, 1963, signed by Lieutenant General Harold W. Grant as Deputy Administrator (JA 26),\* Pepco was advised that "our examination of this matter forces us to deny the petition for a hearing" because "The grounds given . . . do not constitute adequate foundation".

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\* The copy of this letter included in the Record shows General Grant as signing as "Acting" Administrator. The original, received by Pepco, shows him signing as "Deputy" Administrator.

## **STATUTES AND REGULATIONS**

The pertinent statutory and regulatory provisions are set forth in the Petitioner's Appendix (PA 1-43).

### **STATEMENT OF POINTS**

1. If it is not made clear that the Determination cannot affect Pepco adversely, it is reviewable.

2. If the Determination can affect Pepco adversely, its issuance was beyond the statutory authority of the Administrator.

3. If, despite adverse effect on Pepco, the Act authorized the issuance of the Determination, then such issuance was in violation of the Fifth Amendment to the Constitution.

4. If, despite its adverse effect on Pepco, the issuance of the Determination was within the statutory and constitutional authority of the Administrator, then the Administrator erred in issuing the Determination without (i) having extended to Pepco an opportunity to present evidence as to the respective public interests to be served by its proposed facilities and by the airport and (ii) having made appropriate findings as to the efficient utilization of the navigable airspace, supported by substantial evidence of record that the public interest to be served by the air navigation related to the airport is superior to the public interest to be served by Pepco's proposed facilities.

### **SUMMARY OF ARGUMENT**

The Determination is silent as to any specific results flowing from its issuance. Over-all, however, it implies that Pepco's proposed construction is outlawed.

Accordingly, unless the intent of the Determination is clarified by language revision on remand or by judicial holding, the possibility exists that in some future litigation as to Pepco's rights incidental to its proposed use of

its property Pepco will be prejudiced by the Determination, which is alleged by the Administrator to be a "final" one.

In the absence of such clarification the Determination is reviewable by this Court because it may adversely affect Pepco.

Upon review by this Court, the Determination should be found by the Court to be in excess of the statutory authority of the Administrator because (i) it is a regulation of the use of the airspace by non-aeronautical structures, (ii) the airspace to be occupied by the structures is not navigable airspace within the meaning of the Act, and (iii) the structures have not been found to have any potential adverse effect on air commerce, as defined in the Act.

Further, if (despite the normal rule that whenever possible a statute will be construed so as to avoid its unconstitutional application) the Court should find that the issuance of the Determination, although adversely affecting Pepco, was within the Administrator's authority under the Act, then such issuance was in violation of the Fifth Amendment because it effected a taking by the Federal government of property for private, rather than public use, and because the Act forbids the payment of compensation by the Federal government for such taking.

Finally, if the Determination is reviewable because of its adverse effect on Pepco and if, upon such review, the issuance of the Determination is found to have been within the statutory and constitutional authority of the Administrator, then the Administrator erred in such issuance because Pepco was given no opportunity to present evidence, and the Administrator made no finding, with respect to the efficient utilization of the navigable airspace in the light of the over-all public interest, despite the statutory requirement (Sec. 307(a), JA 8) that the Administrator assign the use of the navigable airspace as he may deem necessary, in the light of the public interest, in order to insure the safety of aircraft and the efficient utilization of such airspace.

## ARGUMENT

### **I. THE DETERMINATION IS REVIEWABLE BECAUSE IT MIGHT ADVERSELY AFFECT PEPCO, UNLESS IT IS MADE CLEAR, BY REVISION OF THE DETERMINATION OR BY JUDICIAL PRONOUNCEMENT, THAT IT CANNOT SO OPERATE.**

#### **1. The Effect of the Determination on Pepco Is in Doubt.**

The Determination was issued pursuant to Part 626 of the Regulations (14 CFR), as in effect prior to December 12, 1962 (PA 24), which assigns as the authority for its issuance Secs. 104, 307, 313, 1001 and 1101 of the Act.

Briefly, to the extent pertinent, Sec. 104 of the Act (PA 5) recognizes and declares to exist a public right of freedom of transit through the navigable airspace; Sec. 307 (PA 8) directs the Administrator to "assign" the use of the navigable airspace in order to insure the safety of aircraft and the "efficient utilization" of such airspace; Sec. 313 (PA 11) is a general grant of authority to the Administrator to do all things necessary to carry out the provisions of the Act; Sec. 1001 (PA 13) relates to the procedure to be followed by the Administrator in conducting his proceedings; and Sec. 1101 (PA 16) directs the Administrator to require public notice of the proposed construction of any structure where notice will promote safety in "air commerce".

In the preamble to Part 626 (PA 20) it is stated, with reference to comments received from the public in response to the previously published Notice of Rule Making,

"A substantial number of comments were directed to the authority and jurisdiction of the Administrator to adopt a regulation on the subject of the heights of structures . . . A brief reference to our statutory authority should be sufficient here. The Federal Aviation Act continued the recognition and declaration previously made in the Civil Aeronautics Act of the 'public right of freedom of transit through the navigable airspace of the United States'. In addition, the Act

authorizes and directs the Administrator to regulate the use of the navigable airspace in order to insure aircraft safety and efficient utilization and to require notice of the proposed construction or alteration of any structure where such notice would promote air safety. These, and the other authorities referred to in the notice of proposed rule making, provide an ample basis for the regulatory action being taken here. This regulation not only constitutes a proper measure to carry out the purposes of the Act, but, under the circumstances, is required if we are to properly perform the responsibilities and duties entrusted to us by the Congress".

Such preamble also says, with respect to Part 626 as proposed in the Notice of Rule Making, that

"The proposal evoked numerous comments from the aeronautical, television and broadcasting industries as well as railroads, power companies and other utilities, and related manufacturing industries. . . . Due to the complexity of the subject matter of our proposal and *its effect upon diverse non-aviation interests*, a hearing was held . . ." (PA 20, emphasis supplied).

In the same preamble it is also said (PA 22), with reference to comments received with respect to the proposed rule making, that

"... the Agency found itself unable to comply with a request for relaxation of the requirement for additional notice at the time the new construction or alteration is erected to a height which would equal the original criteria. This notice is necessary to permit placing the new structure on charts used in air navigation. *Such charting may not be accomplished on the basis of the initial notice since many proposed structures are never erected*" (emphasis supplied).

The preamble further says (PA 22) that

"The regulation adopted does not *brand* immediately as hazards all proposed construction which would

exceed the criteria but, rather, provides that the *offending* proposal would require only a preliminary determination of hazard, which preliminary determination would expire upon the initiation of an aeronautical study" (emphasis supplied)

and that "The criteria established in the regulation are more *lenient* than those contained in the notice" (emphasis supplied).

The preamble also points out (PA 23) that

"provision is made for the possible adjustment of (1) aviation requirements to accommodate the construction proposals and (2) the location and height of the proposed structures to eliminate or minimize their effects on air navigation. *It is expected that a very large proportion of the conflicts between proposed structures and air navigation for the use of the navigable airspace will be resolved in these informal studies and that a relatively small number will require a hearing*" (emphasis supplied).

Finally, the preamble clearly indicates that the Administrator intends, through Part 626, to play a leading role in fixing the location of broadcasting antennae when it says (PA 23):

"We believe that proper fulfillment of our statutory responsibilities must include *the promulgation of regulations which will lessen the detrimental effect of tall structures on the use of the navigable airspace*. The grouping of antenna structures is, obviously, such a measure. However, much of its beneficial effect could be lost if the farm areas established were not compatible with the over-all needs of the broadcast industry. Accordingly, this portion of our proposal has been revised to include an affirmative requirement that the views of the Federal Communications Commission will be requested before any antenna farm area is established and that *such views will be given full consideration prior to any FAA action*" (emphasis supplied).

Part 626 itself states (PA 24) that its purposes are

(1) To require persons to give notice of proposed construction;

(2) To establish criteria for determining whether a proposed structure would be a hazard;

(3) To provide for aeronautical studies of construction proposals which would exceed the criteria; to determine the effects of such structures upon the safety of aircraft and the efficient utilization of airspace; and to prescribe the manner of issuance of such determinations;

(4) To provide for public hearings for making "Final Determinations" as to whether specific construction proposals would result in hazards to air navigation;

(5) To "establish" antenna farm areas at "prescribed" locations with "specified" dimensions of area and height.

Further, Sec. 626.51 of Part 626 (PA 36) says that

"Hearings conducted on the proposed construction or alteration of structures in order to determine the effect of such construction or alteration upon the safety of aircraft and the efficient utilization of the navigable airspace are purely fact-finding in nature and, therefore, are not subject to the provisions of sections 4, 5, 7 and 8 of the Administrative Procedure Act. As a fact-finding procedure, the hearing is non-adversary and there are no formal pleadings or issues and no adverse parties".

In ascertaining the purpose of the Administrator in promulgating Part 626 it is worthy of note that in the "Notice of Proposed Rule Making" which was published in the Federal Register on September 16, 1960 (25 FR 8911)

it is said, with respect to the procedures proposed to be incorporated in Part 626, that

“These procedures will provide a forum and a means for the Agency [i.e. the FAA] to give full consideration to the public interest in safe air commerce and *the interests of the construction sponsor*” (PA 19, emphasis supplied).

As noted above, neither Part 626 nor the sections of the Act under the authority of which the Part was allegedly issued give any clear indication of the purpose, intent or effect of the Determination. Further, Pepco has been unable to obtain from any member of the staff of the FAA any indication as to the purpose, intent or effect of the Determination. In this connection, the statements made by the Administrator on August 25, 1961 in connection with his promulgation of certain “Miscellaneous Amendments” to Part 626 are of considerable interest (PA 39):

“The FAA-FCC discussions underscored the existence of uncertainty in the broadcast industry with respect to the effect on FCC jurisdiction of the Agency findings made subsequent to the hearings held under Subpart D [of Part 626—the type of public hearing denied to Pepco]. These hearings are conducted to determine the effect of proposed structures upon the safety of aircraft and the efficient utilization of the navigable airspace. The findings made form the basis for a determination as to whether a proposed structure would, in fact, result in a hazard to air navigation. *While we regard this determination as a final one on the question of air hazard*, our findings should not be construed to prejudice the exercise by the Commission of its statutory jurisdiction, particularly its authority to determine whether a construction permit for such a structure should be issued. Accordingly, *we are promulgating an expression of our opinion on this point. This conclusion should not be interpreted as an attempt to settle any justiciable rights which may be the subject of later controversy. Any individual who believes an FAA . . . action has deprived him of one*

*or more rights may apply, of course, to the appropriate court for a review and decision on the matter"* (emphasis supplied).

One of the "Miscellaneous Amendments" thus made by the Administrator was the addition to Sec. 626.50 of Part 626 of this note (PA 36):

"NOTE: Any findings entered hereunder are without prejudice to the jurisdiction of the Federal Communications Commission to grant or deny applications for construction permits under the Communications Act of 1934, as amended."

Broadly speaking, there are four possible interpretations that could be given to the Determination in this case:

(1) It might be considered to be merely a tool for use by the Administrator in marking aeronautical charts and otherwise advising flying interests as to the existence of Pepco's structures. However, if that were the purpose of the Determination, it would not appear appropriate for it to open (as it does) with the statement that the FAA has circularized Pepco's proposal for aeronautical comment "and has conducted a study to determine its effect upon the safe and efficient utilization of airspace" (JA 17), since that is the language of Sec. 307(a) of the Act (PA 8), which directs the Administrator to "assign . . . the use of the navigable airspace", and not the language of Sec. 1101 of the Act (PA 16), which merely directs the Administrator to require notice be given him of any construction proposal "where notice will promote safety in air commerce". Further, if that were the purpose of the Determination, it would hardly appear to be necessary to provide the elaborate machinery of preliminary determination, aeronautical study, public hearing and publication in the Federal Register that Part 626 affords. Finally, the preamble to Part 626 (PA 22), as noted above, recognizes that aeronautical charts can't be appropriately marked

until the structure is actually constructed, so that a determination with respect to *proposed* construction (as is involved here) will be useless for chartmarking purposes.

(2) The Determination might be considered (particularly in view of the provisions of Sec. 626.51 of the Regulations [PA 36]) to be simply a finding of fact that the existence of Pepco's structures and the operation of the airport will be incompatible. If that were the intent, however, the Determination would not normally be expected to speak solely of hazards to air navigation, since it is clear that if, in fact, Pepco's facilities will be a hazard to aircraft using the airport then those aircraft will, to the same extent, be a hazard to Pepco's facilities. Further, such a finding of fact would not touch upon the "efficient utilization of the navigable airspace".

(3) Since the Administrator is primarily concerned with the safety of the flying public and since he must be presumed to be aware of his lack of authority over non-aeronautical uses of the airspace (see below), the Determination may have been intended simply as a factual finding of a potential hazard to flying operations at Freeway Airport which, when it becomes a reality, will have to be recognized by the Intervenor proprietors of the airport in determining whether to continue to use the affected runways and thus expose their users to the risks inherent in the existence of the hazard.

(4) The Determination might be intended as a basis for preventing Pepco from, or penalizing Pepco for, erecting the structures which have been determined to be a potential hazard to air navigation.

**2. Its Effect Being in Doubt, It Is Possible That the Determination Might Operate to Affect Pepco Adversely.**

Obviously, it is in Pepco's interest to assert and maintain (as it does) that the Determination cannot in any way prejudice Pepco in its construction, operation and maintenance of its proposed above-ground electric transmission facilities. Indeed, Pepco is convinced, in the light of the lack of authority in the Administrator to control the use of airspace by non-aeronautical interests (see below) that paragraph (3) in subsection 1, above, correctly sets forth the purpose and effect of the Determination.

However, Pepco must be realistic in its appraisal of how the Determination *might* affect it. Central to that problem are these facts:

(1) The Act declares "to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace" (PA 5) and defines "navigable airspace" as including airspace "needed to insure safety in take-off and landing of aircraft" (PA 4).

(2) The Administrator is "empowered and directed to encourage and foster the development of civil aeronautics" (PA 8) and is authorized and directed to "assign by rule, regulation, or order the use of the navigable airspace . . . in order to insure the safety of aircraft and the efficient utilization of such airspace" (PA 8), and the Determination opens with the statement that the FAA "has conducted a study to determine [the] effect [of Pepco's proposal] upon the safe and efficient utilization of airspace" (JA 17). It closes with the statement that it "is *effective* as of the date of issuance and will become *final* 30 days thereafter unless an appeal is filed" (JA 18, emphasis supplied).

(3) The Administrator has adopted lengthy and very detailed Regulations (PA 24) providing for the issuance and

becoming "final" of determinations such as the one here involved (which are then formally published in the Federal Register), which regulations in very large part go beyond the simple statutory requirement of the Act that "The Administrator shall . . . require all persons to give adequate public notice . . . of the construction or . . . proposed construction . . . of any structure where notice will promote safety in air commerce" (PA 16).

(4) The Regulations and their preamble (PA 20) suggest that a determination that a proposed structure will constitute a hazard to air navigation is intended to be adverse to such structure. For example, the preamble says that "Due to the complexity of the subject matter . . . and *its effect upon diverse non-aviation interests*, a hearing was held" (PA 20, emphasis supplied), that

"A substantial number of comments were directed to the authority and jurisdiction of the Administrator to adopt *a regulation on the subject of the heights of structures* . . . A brief reference to our statutory authority should be sufficient . . . [T]he Act authorizes and directs the Administrator to regulate the use of the navigable airspace in order to insure aircraft safety and efficient utilization . . ." (PA 21)

and that the Administrator believes "that proper fulfillment of our statutory responsibilities must include the promulgation of regulations which will lessen the detrimental effect of tall structures on the use of the navigable airspace" (PA 23). Further, it says that the Regulations do not "brand" immediately as hazards all proposed construction which would exceed the criteria but, rather, provide that the "offending" proposal would require only a preliminary determination of hazard which would expire upon the initiation of an aeronautical study (PA 22). In general, whether intentionally or otherwise, the entire wording of the preamble and the Regulations is such as to leave the reader with the definite feeling that a structure

which has been determined to be a hazard to air navigation is one which the Administrator has found to be improper and has outlawed.

Even if the Determination is not intended to have any adverse effect on Pepco, nevertheless, in the light of those facts, it is only realistic to recognize that at some time in the future some court *might* give weight to the Determination adverse to Pepco in an action, for example, brought to enjoin Pepco from constructing or maintaining its proposed transmission facilities, or one brought against Pepco to recover for damages suffered by a flyer as a result of his airplane coming into contact with Pepco's facilities\*, or one brought by Pepco for damages suffered by Pepco as a result of an airplane coming into contact with its facilities.

**3. If the Determination Adversely Affects Pepco, It Is Reviewable. If Such Effect Is Not Intended, the Possibility of Adverse Effect Should Be Avoided by a Revision of the Language of the Determination or by a Judicial Pronouncement Making Clear That It Cannot Have Adverse Effect on Pepco.**

In essence, the question of whether the Determination is reviewable depends on whether it adversely affects Pepco. This is in doubt, although it is clear that the general tenor of the Determination, and the Regulations under which it was issued, is such as to suggest to the reader that the proposed structures have been outlawed. Since it is wholly possible that in the future some court might choose to give such an outlawing effect to the Determination, it must follow that Pepco is presently adversely affected by the Determination.

If it should be held that the Determination is not reviewable because the damage to Pepco is presently un-

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\* See, for examples of such actions brought by flyers, *Strother v. Pacific Gas & Elec. Co.* (Dist. Ct. App., 1949), 94 Cal. App. 2d 525, 211 P. 2d 624, and *La Com v. Pacific Gas & Elec. Co.* (Dist. Ct. App., 1955), 132 Cal. App. 2d 114, 281 P. 2d 894.

known and cannot be known until some action is taken by some court in the future, Pepco would thereby be effectively denied any opportunity to attack the Determination as unauthorized or lacking in procedural due process, since, it having become "final", it would not be open to collateral attack. See, for example, *Frozen Food Express v. U.S.* (1956), 351 US 40, 45; 100 L. ed. 910, 915; 76 S. Ct. 569, 571, where the Interstate Commerce Commission argued for the finality of the order under review and it was held to be reviewable, as compared with *U.S. v. Los Angeles & S.L.R. Co.* (1927), 273 US 299, 71 L. ed. 651, 47 S. Ct. 413, where the statute made it clear that the order as to which review was denied was not a final one.\*

If the Determination adversely affects Pepco, judicial review should be granted. If, on the other hand, it is not intended adversely to affect Pepco, then the possibility that it might, in the future, have an adverse effect on Pepco should be avoided either by this Court's holding, in a published opinion denying judicial review, that the Determination cannot be deemed in any way adversely to affect Pepco's rights, or by this Court's remanding the Determination to the Administrator with instructions either to revoke and rescind the Determination or to amend it so as to include in it appropriate language to the effect that it is not intended, and shall not be deemed, to affect in any way any rights which Pepco would otherwise have with respect to the construction, maintenance and operation of above-ground electric transmission facilities on its fee-owned property.

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\* See also *Joint Anti-Fascist Refugee Committee v. McGrath* (1951), 341 U.S. 123, 140, 95 L. ed. 817, 837, 71 S. Ct. 624, 632, where the Court said:

"The touchstone to justiciability is injury to a legally protected right. . . . It is unrealistic to contend that because the respondents gave no orders directly to the petitioners to change their course of conduct, relief cannot be granted. . . . We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them."

**II. IF THE DETERMINATION ADVERSELY AFFECTS PEPCO, ITS  
ISSUANCE EXCEEDED THE STATUTORY AUTHORITY OF THE  
ADMINISTRATOR.**

- 1. The Act Does Not Vest the Administrator with Power to  
Assign the Use of Navigable Airspace by Non-Aeronautical  
Structures.**

Sec. 307(a) of the Act (PA 8) provides that

“The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and to assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.”

and is the section primarily relied on by the Administrator as the authority for Subparts C and D of Part 626 of the Regulations (PA 32), dealing with the determination of the effect of proposed structures upon the use of navigable airspace. Senate Report No. 1811, dated July 9, 1958, says, after discussing the confusion, under the then existing statutory and regulatory set-up, as to what agency should control the use of the airspace:

“The [Act] proposes to clear away this ambiguity once and for all by vesting unquestionable authority for all aspects of airspace management in the Administrator of the new Agency. The ‘heart’ of the . . . Act is contained in section 307(a) . . .” (PA 52).

If the Determination can have an adverse effect on Pepco's rights to erect its public service facilities on its fee-owned lands, the authority for its issuance must be found in Sec. 307(a). It is our contention that a reading of the Act as a whole, and a study of its legislative history, make it abundantly clear that no such authority is given to the Administrator by that section.

Basic to a consideration of the meaning of the Act on this point is the realization that if the Congress intended to vest in the Administrator, an agent of the Executive Department chosen primarily for his expertise in aeronautical matters\*, the power to control the use and occupancy of any portion of the airspace by non-aeronautical, land-based structures, that purpose and intent would strike so deeply at our fundamental concepts of the rights of real property ownership that it should and could only be found to exist if expressed in clear, unambiguous and reasoned terms. It could, potentially, adversely affect every owner of land in the nation and subject all surface uses to the prior and privileged use by aircraft of the airspace superjacent to the surface. As the Supreme Court, citing *U. S. v. Causby* (1946), 328 U.S. 256, 90 L. ed. 1206, 66 S. Ct. 1062, said, in *Griggs v. Allegheny County* (1962), 369 U.S. 84, 88, 7 L. ed. 2d 585, 588, 82 S. Ct. 531, 533:

“But as we said in the *Causby* case, the use of land presupposes the use of some of the airspace above it. 328 U.S., at 264. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the ‘superadjacent airspace’ will often ‘affect the use of the surface of the land itself.’ 328 U.S., at 265.”

We submit that it is inconceivable that Congress intended to vest such a drastic and far-reaching power in the Administrator. Rather its intent was to vest in the Administrator power and responsibility to control *aeronautical* uses of the navigable airspace. This, we believe, is made clear by the Act itself and by its legislative history:

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\* Both the Administrator and his Deputy are required to be persons who “have had experience in a field directly related to aviation”. Secs. 301(b) and 302(b) of the Act (PA 6 and 7).

(1) The language of the Act:

The Act is entitled (PA 1)

“An Act to . . . provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft”

and is thus one primarily concerned with the safe and efficient use of airspace *by aircraft*. Only negatively (in the sense that use of airspace by a land-based structure prevents its use by aircraft) does the title of the Act even impliedly indicate that it deals with the use of airspace by non-aeronautical structures.

Sec. 103(c) (PA 5)—In exercising and performing his powers and duties the Administrator shall consider to be in the public interest “The control of the use of the navigable airspace . . . and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both”.

Sec. 301(b) (PA 6)—“The Administrator shall have no pecuniary interest in or own any stock in or bonds of any *aeronautical* enterprise . . .” (emphasis supplied). If the Congress had intended him to control airspace use by non-aeronautical interests, assuredly it would have broadened this provision to cover financial interest in public utilities, broadcasting companies and industries generally, for example. See also Sec. 302(b) (PA 7) making the same requirement as to the Deputy Administrator.

Sec. 303(a) (PA 7)—“The Administrator is empowered to make . . . expenditures for . . . (5) membership in and cooperation with such organizations as are related to, or are part of, *the civil aeronautics industry or the art*

of aeronautics . . . (7) making investigations and conducting studies in *matters pertaining to aeronautics . . .*" (emphasis supplied). Surely, if Congress had intended him to control non-aeronautical uses of airspace, it would have empowered him to make expenditures to investigate and study those uses.

Sec. 305 (PA 8)—"The Administrator is . . . directed to encourage and foster the development of civil aeronautics and air commerce . . ." If Congress had envisioned the Administrator as a controller of both aeronautical and non-aeronautical uses of the airspace, it would not have "*directed*" him "*to encourage and foster . . . civil aeronautics and air commerce*" (emphasis supplied) without a balancing directive to consider and weigh the interests of non-aeronautical users.

Sec. 307(a) (PA 8)—"The Administrator is . . . directed to develop plans for and formulate policy with respect to the use of the navigable airspace". If such development and formulation were intended to cover non-aeronautical as well as aeronautical uses of the navigable airspace, it would be a very large order, indeed, and one which would tread directly on the toes of many State and Federal agencies.

Sec. 307(b) (PA 8)—This section, following directly after the apparently (to the casual eye) very broad authority to control *all* uses of the navigable airspace given in Sec. 307(a), is limited to authority over aeronautical matters—which, under normal rules of construction, would appear to limit the seemingly broad authority given in 307(a).

Sec. 307(c) (PA 8)—This section, again, is narrowly confined to "air traffic rules and regulations" to be prescribed for, among other things, "the protection of persons and property on the ground, and for the efficient utilization

of the navigable airspace". We submit that Congress must have intended it to mean "for the efficient aeronautical utilization of the navigable airspace", since the section is directed only to "air traffic rules and regulations".

Sec. 308(b) (PA 10)—This section, "In order to assure conformity to plans and policies for allocations of airspace by the Administrator under section 307", forbids the establishment of any military airport unless prior notice is given to the Administrator so that he may advise "as to the effects of such . . . establishment . . . on *the use of airspace by aircraft*" (emphasis supplied). This strongly indicates that Sec. 307 "allocations" of "the use of the navigable airspace" are intended to be "allocations" of the *aeronautical* use of such airspace.

Sec. 309 (PA 10)—Here, again, the Administrator is to be notified of the proposed establishment of non-Federally financed airports "so that he may advise as to the effects of such construction on *the use of airspace by aircraft*" (emphasis supplied). Under this section, if the proprietors of Freeway Airport proposed to substantially alter a runway layout they would be required to give the Administrator advance notice so that he could advise as to the effects of such alteration "on the use of airspace by aircraft", but he would not be required to advise as to the effect on non-aeronautical uses of the airspace.

Sec. 312(a) (PA 11)—This Section in large part restates the first clause of Sec. 307(a), but with enlightening variations. Here the Administrator is directed to make "plans for and formulate policy with respect to the orderly development and use of the navigable airspace, and the orderly development and location of . . . aids and facilities for air navigation, as will best meet the needs of, and serve the interest of civil aeronautics and national defense . . ." Under this directive, his only concern is as to what "will best meet the needs of, and serve the interest of civil aero-

nautics and national defense", so that if his control of the use of the navigable airspace included the control of non-aeronautical uses he would, in effect, by this section be directed to pay no heed whatsoever to the "needs" and "interest" of such non-aeronautical uses. Surely, Congress cannot have intended any such directive as that.

(2) The legislative history of the Act:

Under date of June 13, 1958, President Eisenhower addressed a message to the Congress (see Appendix A to Senate Report No. 1811, July 9, 1958) recommending "the establishment of an aviation organization in which would be consolidated among other things all the essential management functions necessary to support the common needs of our civil and military aviation" (PA 55). Such message indicated that "Recent midair collisions of aircraft" (PA 55) were the compelling events which gave rise to the message. It stated that "A fully adequate and lasting solution of the Nation's air traffic management problems will require a unified approach to the control of aircraft in flight and the utilization of airspace" (PA 55) and concluded with these two recommendations (PA 56):

"I recommend that the Federal Aviation Agency be given full and paramount authority over *the use by aircraft of airspace* . . . .

"To assure maximum conformance with the plans, policies and allocations of the Administrator with respect to airspace, I recommend that the legislation prohibit the construction or substantial alteration of any airport . . . until prior notice has been given to the Administrator and he is afforded a reasonable time to advise as to the effect of such construction *on the use of airspace by aircraft*" (emphasis supplied).

Senate Report 1811 reviews the need for the legislation and says (PA 50) "the most urgent need in aviation today is for the prompt development and institution of a system

of *air-traffic control* which will insure the utmost degree of safety for all *airspace users*, civil and military alike" (emphasis supplied). It then discusses further the need for "Plenary airspace control" (PA 52) and the provisions of Section 307(a) (which, as noted above, it calls the "heart" of the Act) and then says, as to "Airport site control" (PA 54):

"Effective airspace management and planning is not a matter involving airborne craft alone. As a natural corollary it also involves the location of new airports, missile sites, etc., whose landing patterns or other airspace requirements may conflict with the present usage of airspace".

It is highly significant that neither here nor anywhere else in Senate Report 1811 is there any mention of airspace management and control as having any possible effect on non-aeronautical uses of the airspace, thus indicating clearly that the Committee, in reporting out the bill, did not conceive of it as having any impact on such non-aeronautical uses.

Appendix B to Senate Report 1811 indicates (PA 57) that the bill as reported out by the Committee conforms to the Presidential recommendation that the FAA "be given full and paramount authority over the use by aircraft of airspace" and suggests in no way that such authority has been broadened in the bill to include the use of airspace by land-based structures.

House Report No. 2360, dated August 2, 1958, also is silent with respect to any thought that the Act is intended to give the Administrator controlling authority over non-aeronautical uses of the airspace. Under "Purpose of Legislation" the Report says (PA 59):

"The principal purpose of this legislation is to establish a new Federal agency with powers adequate to

enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations.

"The Administrator . . . (2) would be charged with the management of the national airspace, including responsibility for establishing and enforcing air traffic rules and for the development and operation of air-navigation facilities . . . .

"The [FAA] would be headed by a civilian Administrator with plenary authority to—

*"(a) Allocate airspace and control its use by both civil and military aircraft;*

*"(b) Make and enforce air traffic rules for both civil and military aircraft;*

*"(c) Develop and operate a common system of air navigation facilities for both civil and military aircraft;*

*"(d) Make and enforce safety regulations governing the design and operation of civil aircraft." (emphasis supplied).*

When the bills which ultimately became the Federal Aviation Act of 1958 were originally introduced in the Congress they did not contain what is now Sec. 307(a). Instead, they were drafted to amend Sec. 302(a) of the Civil Aeronautics Act of 1938, which then read, in part

"The Administrator is authorized and directed to designate and establish such civil airways as may be required in the public interest . . . ."

so that such section would read

"The Administrator is authorized and directed to control the use of the airspace of the United States, including the designation of Federal airways as may be required in the public interest . . . ."

Notwithstanding this proposed amendment, and other related proposed amendments which referred to "plans and

policies for, and allocations of, airspace by the Administrator", Senator Monroney, in opening the hearings on the Senate Bill (S. 3880) before the Subcommittee on Aviation of the Committee on Interstate and Foreign Commerce on June 4, 1958, described the bill as one "to provide for the safe and efficient use of airspace by both civil and military aircraft" and said that

"The principal provisions of the bill may be generally summarized as follows:

"1. It creates a Federal Aviation Agency . . .

"2. It gives the Administrator the authority to regulate the use of all airspace . . . by both civil and military aircraft . . . ."

Similarly, Congressman Harris, in opening the hearings on the companion House Bill (H.R. 12616) on June 24, 1958, before the Subcommittee on Transportation and Communications of the Committee on Interstate and Foreign Commerce, described the bill as being one "to regulate the use of all airspace . . . by all aircraft, civil and military".

In sum, it is clear that nowhere in the legislative history of the Act is there the slightest indication that the Congress intended to give, or thought that it was giving, to the Administrator any authority or directive to control non-aeronautical uses of the navigable airspace. All concerned seemed in agreement that the only interests involved in the question of the control and allocation of the airspace were aeronautical interests. The Chairman of the Civil Aeronautics Board, who opposed many of the provisions of the Act dealing with the participation of the military in its administration, said (PA 72):

"The Defense Establishment is the largest and one of the most important users of the airspace. S. 3880 [i.e. the Act] ignores the fact that there are other important users such as the certificated air carriers, the supplemental carriers, general aviation, and the private flyer who are also vitally concerned with the allocation of airspace."

but he did not suggest in any way that public utilities or broadcasting companies or large industrial companies might be "vitally concerned with the allocation of airspace".

Accordingly, we submit, on the basis of the internal evidence in the Act as well as its legislative history, that Congress intended that Section 307(a) of the Act should be read substantially thus:

"The Administrator is authorized and directed to develop plans for and formulate policy with respect to the *aeronautical* use of the navigable airspace; and assign by rule, regulation, or order the *aeronautical* use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient *aeronautical* utilization of such airspace. He may modify or revoke such assignment when required in the public interest" (emphasized words supplied).

**2. Airspace Required for Landings and Takings-Off at Freeway Airport Is Not "Navigable Airspace" and Hence Its Use Is Not Subject to Assignment by the Administrator.**

Sec. 104 of the Act (PA 5) recognizes and declares to exist in behalf of each citizen a public right of freedom of transit through the navigable airspace of the United States, and Sec. 101(24) (PA 4) defines "navigable airspace" to include "airspace needed to insure safety in take-off and landing of aircraft". But the Supreme Court, in *Griggs v. Allegheny County*, above, held that even though Congress had thus placed the navigable airspace, as defined, in the "public domain" nevertheless "the use of land presupposes the use of some of the airspace above it" and that, therefore, when the exercise of the "public right of freedom of transit through the navigable airspace" prevents the owner of the subjacent land from making use of the land for lawful purposes, there is a taking, in the constitutional sense, for which just compensation must be paid. The Court further, and most importantly, held that the party doing the taking is the airport which invites and per-

mits the landing and taking-off of aircraft. Thus, if aircraft landing and taking-off at Freeway Airport can, under the Act, preempt the use of the airspace superjacent to Pepco's land, and thus prevent Pepco from making its desired lawful use of such land, there would, under *Griggs*, be a constitutional taking of Pepco's property *by the airport* for which Pepco must be compensated *by the airport*. We submit that the Act should not and cannot be construed to authorize such a preemption.

In *Griggs* the airport was owned and operated by a political subdivision having the power of eminent domain and was dedicated to public use in conformity with the rules and regulations of the Civil Aeronautics Administration within the scope of the National Airport Plan provided for in the Federal Airport Act (Act of May 13, 1946, c. 251, 60 Stat. 170, as amended, 49 USC §§1101-1119). Further, the airport there involved was financed in part by Federal funds, with the allowable costs payable by the Federal government including "costs of acquiring land or interests therein or easements through or other interests in air space . . ." (49 USC §1112(a)(2)). Here, Freeway Airport is privately owned and operated and has none of those characteristics.

The Federal Aviation Act sharply recognizes the distinction between Federally financed airports and other airports. Sec. 308(a) (PA 10) forbids the expenditure of Federal funds on any landing area or airport "except upon written recommendation and certification by the Administrator that such landing area or facility is reasonably necessary for use *in air commerce* or in the interests of national defense" (emphasis supplied). As to airports not involv-

ing expenditure of Federal funds, the Act (Sec. 309, PA 10) merely states that they shall not be established or constructed "unless reasonable prior notice thereof is given the Administrator . . . so that he may advise as to the effects of such construction on the use of airspace by aircraft". Further, in the case of a privately owned and operated airport, not Federally financed in whole or in part, there is no requirement that "there shall be no exclusive right for the use" of such airport, as is true, under Sec. 308(a) of the Act (PA 10), with respect to Federally financed airports.

Accordingly, since exercise of the public right of transit through the lower reaches of the navigable airspace, superjacent to land owned by another, which are needed for landings and takings-off will frequently affect the surface owner's use of his land and thus effect a taking in the constitutional sense for which, under *Griggs*, just compensation must be paid *by the airport*, and since a privately owned and operated airport, such as Freeway, does not have the power of eminent domain and may not have the financial resources required to pay the constitutionally required just compensation (because it does not have access to Federal or other public funds), we submit that in the definition of "navigable airspace" the phrase "airspace needed to insure safety in take-off and landing of aircraft" must be interpreted to mean "airspace needed to insure safety in take-off and landing of aircraft at publicly-owned or Federally financed landing areas having the power of eminent domain".

Congress has evidenced deep interest in the establishment and successful operation of an adequate number of "public airports" as defined in the Federal Airport Act

(Act of May 13, 1946, c. 251, 60 Stat. 170, as amended, 49 USC §§1101-1119) and the International Aviation Facilities Act (Act of June 16, 1948, c. 473, 62 Stat. 450, as amended, 49 USC §§1151-1160), but it has nowhere evidenced the same interest in the establishment and successful operation of privately owned and operated airports. To assume that it intended, by the Act's definition of navigable airspace, to give to every private individual who wishes to establish a landing strip on his property the right to control his neighbor's use of his property is to assume that Congress intended to vest the right of eminent domain in each such landing strip proprietor even though his facility has not been found to be "reasonably necessary for use in air commerce or in the interests of national defense" (Sec. 308(a) of the Act, PA 10)—a proposition not only patently unbelievable but also patently unconstitutional, since the sovereign power of eminent domain, historically and constitutionally, can be delegated only to those whose operations are vested with a public interest.\*

Further support, of a negative nature, for the conclusion that the right of transit through the airspace below the minimum altitudes of flight prescribed by regulation is intended to be given only in connection with landings and

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\* See *Madisonville Traction Co. v. St. Bernard Mining Co.* (1905), 196 U.S. 239, 251; 49 L. ed. 462, 467; 25 S. Ct. 251, 256, where the Court said:

"There ought not to be any dispute, at this day, in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. . . ."

See also *Cline v. Kansas Gas and Electric Co.* (1958), 260 F. 2d 271, 273, where the Tenth Circuit said:

"... It is a principle firmly imbedded in the field of fundamental law that the power to appropriate private property for public use is an attribute of sovereignty. But . . . the legislature may delegate such right to another, provided that the property is to be devoted to public use, that there is public necessity that it be taken for such use, and that provision is made for the payment of just compensation. . . ."

takings-off at publicly owned or Federally financed airports having the power of eminent domain is found in the legislative history of the Act. Nowhere in such history is there any suggestion that Congress intended to give such right, or the right of eminent domain, to privately owned and operated airports.

If it be argued that *Griggs* must be limited to its facts, i.e. to a holding that when the airport involved is publicly owned then the taking is by the airport, and that it is not determinative of the party doing the taking when the airport is privately owned and operated with no public service obligations, this must lead to the conclusion that in the case of a privately owned and operated airport the taking of property needed for landings and takings-off is done by the Federal government which must, therefore, provide, from the public treasury, the just compensation to which the injured landowner is constitutionally entitled. But that would result in the expenditure of Federal funds to acquire a right for the benefit of a private person having no public service obligations or duties and whose airport the Administrator has not certified to be "reasonably necessary for use in air commerce or in the interests of national defense". Such expenditure would be violative of Sec. 308(a) (PA 10), when read in conjunction with Sec. 303(c) (PA 7), and would, in addition, be an unconstitutional taking of the injured landowner's property since it would not be for a public purpose as required by the Fifth Amendment to the Constitution.

In sum, then, it must be concluded that the "navigable airspace" does not include "airspace needed to insure safety in take-off and landing of aircraft" at airports which are not publicly owned or Federally financed and do not have the power of eminent domain, and that, therefore, the Administrator does not have statutory authority under Sec. 307(a) of the Act to "assign" the use of airspace superjacent to lands in the vicinity of a private air-

port, not having the power of eminent domain, through which planes must fly in order to land and take-off at such airport, since such right of assignment is applicable only to navigable airspace. Accordingly, the Determination was clearly in excess of the Administrator's statutory authority.

**3. Pepco's Proposed Structures Will Not Affect "Air Commerce" and Hence the Determination Is Beyond the Administrator's Statutory Authority.**

Constitutionally, the Act and the orders issued thereunder by the Administrator can regulate civil aeronautics only to the extent that such aeronautics involve or affect interstate or overseas or foreign commerce and, assuming that the Act gives the Administrator the power to regulate non-aeronautical uses of the navigable airspace (which we deny), can regulate non-aeronautical uses of the airspace only to the extent that such uses affect interstate or overseas or foreign commerce. This is recognized in the Act when, in Sec. 1101 (PA 16), it directs the Administrator to require all persons to give notice of the construction or alteration, or proposed construction or alteration, of any structure "where notice will promote safety in *air commerce*" (emphasis supplied), with "air commerce" and "interstate, overseas or foreign air commerce" (Secs. 101(4) and (20), PA 1 and 2) being defined so as to exclude purely intrastate commerce. Further, there is excluded from "air commerce" by such Sec. 101(20) any interstate, overseas or foreign flights which do not involve carriage "for compensation or hire" or carriage of mail or "operation or navigation . . . in the conduct or furtherance of a business or vocation".

The Determination contains no finding that aircraft using Freeway Airport are engaged in air commerce or that the operations of the airport affect air commerce in any way, and in the absence of such a finding, based on substantial evidence (as to which there is none in the Record), it must

be assumed that the airport, being privately owned and operated, is solely concerned with air operations not subject to the jurisdiction of the Administrator under the Act.\* While such non-jurisdictional air operations might, it is true, affect "air commerce" to the extent they were carried on, it is clear that if they were not carried on they could have no effect on "air commerce". Thus, if Pepco's proposed structures were to prevent or interfere with certain of such non-jurisdictional air operations, as the Determination states will be the case, Pepco's structures would not thereby have any effect on "air commerce".

Accordingly, the Determination, if it adversely affects any of Pepco's rights to use its fee-owned real property for its proper public utility purposes, was in excess of the Administrator's powers under the Act, which are limited to the regulation of air commerce, as defined, and aeronautical and other activities affecting that air commerce.

**III. THE DETERMINATION, IF IT ADVERSELY AFFECTS PEPCO AND IS NOT IN EXCESS OF THE ADMINISTRATOR'S STATUTORY AUTHORITY, IS INVALID BECAUSE ISSUED IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION.**

If the Determination operates to affect Pepco adversely by depriving it of some of the rights which it would otherwise have in connection with the use of its fee-owned real property for the construction, operation and maintenance thereon of its above-ground electric transmission facilities, such deprivation would, under the authority of *Griggs v. Allegheny County*, above, amount to a "taking" of

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\* *Yonkers v. U.S.* (1944), 320 U.S. 685, 88 L. ed. 400, 64 S. Ct. 327; *Atchison, T. & S.F. E. Co. v. U.S.* (1935), 295 U.S. 193, 79 L. ed. 1382, 55 S. Ct. 748; *Panama Refining Co. v. Ryan* (1935), 293 U.S. 388, 79 L. ed. 446, 55 S. Ct. 241.

those rights. And, since Freeway Airport does not have the power of eminent domain, such taking would necessarily have to be by the Federal government. If the Act is construed to authorize the issuance by the Administrator of the Determination with that effect, then, we submit, the "taking" which results from the issuance of the Determination is an unconstitutional one, violating the Fifth Amendment, because

(1) The taking is for private use and not for public use; and

(2) The statute forbids the expenditure of Federal funds to compensate Pepco for the property taken.

It is axiomatic that in order for a taking of private property by the Federal government to be constitutional it must be a taking for public use, as distinguished from private use\*. Here, the Freeway Airport is a privately owned and operated enterprise which has not been found to be vested with any public interest. And the purpose of the Determination (assuming, as we are for purposes of argument, that it adversely affects Pepco) is to assist Freeway Airport in its use of certain of its runways. Thus, the Determination serves no governmental or public purpose and benefits only private individuals, so that the taking is for a private rather than a public use.

Similarly, it is fundamental that under the Fifth Amendment ("nor shall private property be taken for public use, without just compensation") the Federal government can take private property, even for public use, only when just compensation can be obtained from the government by the affected property owner.

If a statute authorizes a taking for a public purpose, but is silent as to a procedure for providing compensation, there are statutory provisions of general application which

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\* See cases cited, page 32, above.

make it possible for the injured party to obtain such compensation. See *United States v. Causby* (1946), 328 U.S. 256, 90 L. ed. 1206, 66 S. Ct. 1062, and 28 USC §1491, providing that

“The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”

But here the Act specifically forbids the expenditure of Federal funds in aid of an airport such as Freeway. Sec. 308(a) (PA 10) reads

“No Federal funds, other than those expended under this Act, shall be expended, other than for military purposes . . . for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area . . . except upon written recommendation and certification by the Administrator that such landing area . . . is reasonably necessary for use in air commerce or in the interests of national defense . . . .”

and Sec. 303(c) (PA 7) says that

“The Administrator, on behalf of the United States, is authorized, where appropriate . . . (2) within the limits of available appropriations made by the Congress therefor, to acquire by purchase, condemnation, lease, or otherwise, real property or interests therein, including, *in the case of air navigation facilities (including airports) owned by the United States and operated under the direction of the Administrator*, easements through or other interests in airspace immediately adjacent thereto and needed in connection therewith . . .” (emphasis supplied).

Freeway Airport has received no such certification and is neither owned by the United States nor operated under

the direction of the Administrator. No other section of the Act authorizes the expenditure of Federal funds for the acquisition of property right such as are here involved.

The above considerations are of particular persuasiveness in reaching the conclusion that Congress, in enacting the Act, did not intend the "navigable airspace" to include that necessary for landings and takings-off at privately owned and operated airports. In addition, however, such considerations inevitably lead, we submit, to the conclusion that if the Determination adversely affects Pepco and is authorized by the Act, then its issuance was in violation of the Fifth Amendment.

**IV. THE DETERMINATION, IF IT ADVERSELY AFFECTS PEPKO AND IS NOT IN EXCESS OF THE ADMINISTRATOR'S STATUTORY AND CONSTITUTIONAL AUTHORITY, IS INVALID BECAUSE PEPKO WAS NOT PERMITTED TO PRESENT EVIDENCE, AND THE ADMINISTRATOR MADE NO FINDING, WITH RESPECT TO THE EFFICIENT UTILIZATION OF THE CONCERNED AIRSPACE.**

If the Determination adversely affects Pepco, and if it is not in excess of the Administrator's statutory and constitutional authority (both of which conditions we deny), the proceedings leading to its issuance must meet the requirements of the Act.

Since Sec. 307(a) of the Act (PA 8) is the only section which even purports to authorize the Administrator to "assign . . . the use of the navigable airspace", we must look to that section to ascertain the statutory requirements with respect to the issuance of the Determination. It directs the Administrator to make the assignment "under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and *the efficient utilization of such airspace*" (emphasis supplied). Further, the section says that the Administrator "may modify or revoke such assignment when required *in the public interest*" (emphasis supplied).

Thus, the Administrator is required, in choosing between competing aeronautical and non-aeronautical uses of the navigable airspace, to decide, in the light of the public interest, which of such uses is preferable from the standpoints of (i) insuring the safety of aircraft and (ii) making the most efficient use of such airspace.

Here the Administrator was faced with two incompatible uses. One was the use of the airspace superjacent to Pepco's land for light aircraft landing and taking-off at a privately owned and operated airport which had not been found to be affected with any public interest. The other was the use of such airspace for land-based public utility structures "essential to the performance . . . of . . . public utility obligations, and essential to the furnishing of adequate electric service to the Washington Metropolitan Area" (JA 22). The Administrator's statutory task was to choose between those uses, having in mind the public interest, for the purpose of best achieving the safety of aircraft and the efficient use of the airspace.

The statutory language, we submit, requires the Administrator, in making his choice and ultimately "assigning" the use of the airspace, to weigh *all* the interests involved and not merely the aeronautical interests. He is required to receive evidence, and to make findings rooted in such evidence, with respect to both the aeronautical and non-aeronautical factors present.

That this is so was recognized by the Administrator in the Notice of Proposed Rule Making which preceded the adoption of Part 626 of the Regulations. There the Administrator said, with reference to the proposed rule:

" . . . In the development of the proposed criteria [for determining the existence of hazards], the Agency has given consideration to the requirements for safety in air commerce and at the same time recognition to the requirements of the users of airspace for surface construction.

"... the regulation also provides procedures for giving individual consideration to a specific structure to permit the Agency to determine whether waiver of the criteria as applied to that structure would be consistent with safety of air commerce. These procedures will provide a forum and a means for the Agency to give full consideration to the public interest in safe air commerce and the interests of the construction sponsor" (PA 19).

Thus in proposing his Regulations the Administrator seemed to recognize that the non-aeronautical interests were to be considered as well as the aeronautical. But in the Regulations themselves no such recognition is given. In fact, Sec. 626.33 of the Regulations as in effect prior to December 12, 1962 (PA 34) says that the Administrator will evaluate each construction proposal only "as to its effect upon the safe and efficient utilization of airspace *by aircraft*" (emphasis supplied) and Sec. 77.37 of the Regulations as made effective December 12, 1962 (PA 41) says substantially the same thing.

Further, from the Record (JA 4-27) it is clear that in applying the Regulations in this case no consideration whatsoever was given to the non-aeronautical public interest in the performance by Pepco of its public service obligations. The opening paragraph of the Determination (JA 17) states, it is true, that the FAA "has conducted a study to determine [the effect of Pepco's proposal] upon the safe and efficient utilization of airspace", but nowhere in the Determination is any finding made as to such "efficient utilization". In fact the only finding made is that "the proposed structure would have a substantial adverse effect upon aeronautical operations at the Freeway Airport". Obviously, such a finding was supported by the evidence which was considered (although such evidence would equally well support a finding that the operation of the airport would have a substantial adverse effect on Pepco's proposed use of its land), but neither that evidence

nor the finding tell us anything as to why, in insuring the efficient utilization of the navigable airspace, Freeway Airport's private operations should be preferred over Pepco's public service activities.

In its petition to the Administrator for a public hearing (JA 22) Pepco alleged that

"The location, construction, maintenance and operation of [Pepco's] steel tower transmission lines . . . in the vicinity of said Freeway Airport, is [*sic*] *essential* to the performance by [Pepco] of its public utility obligations, and *essential* to the furnishing of adequate electric service to the Washington Metropolitan Area, including the many governmental buildings, installations and facilities located therein" (emphasis supplied)

and the Administrator, by denying the petition because "The grounds given . . . do not constitute adequate foundation for the granting of a hearing" (JA 26), must be deemed to have admitted, for the purposes of this review proceeding, the correctness of such allegations of public service essentiality.

If the Administrator had authority to make a determination which would, or could, operate to outlaw Pepco's facilities, then assuredly he was required to receive evidence, and make findings, with respect to the conflicting aeronautical interest in the airport's operations and the non-aeronautical interest in the existence and operation of those Pepco facilities before he could lawfully decide as to the "efficient utilization" of the airspace for the use of which Pepco and the airport are in competition.

Apparently, the Administrator interprets the language of Sec. 307(a) of the Act, directing him to

"... assign . . . the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace" (PA 8)

as meaning that whatever action he takes shall be such as to permit aircraft to operate safely. Thus, when in this case he was faced with two competely incompatible uses of a particular portion of the airspace (i.e. the airspace to be occupied by Pepco's facilities), either of which uses would prevent the other, he concluded that he had no statutory obligation to consider the public interest involved in the Pepco use. This, we submit, was a completely erroneous reading of the statute and one which, in effect, made nugatory the Congressional requirement that the Administrator assign the use of the airspace in order to achieve its most efficient utilization.

Actually, the statutory tests of "safety of aircraft" and "efficient utilization of . . . airspace" are not incompatible in this case, as the Administrator seems to think. The Administrator by his Determination outlawing Pepco's facilities (assuming, as we are solely for the purposes of argument, that to have been the effect of the Determination) certainly achieved the statutory end of insuring the safety of aircraft, but he failed wholly to consider or attempt to achieve the statutory purpose of efficient airspace utilization. If, on the other hand, the Administrator had received evidence, and made appropriate findings, with respect to such efficient utilization and had as a result determined that the competing aircraft operations should be outlawed, that would have achieved both of the statutory ends—aircraft safety would have been achieved by forbidding them to fly through the concerned airspace and efficient utilization would have been achieved by permitting Pepco to use its land, and the superjacent airspace, for its essential public service facilities.

If the issuing of a determination that a proposed Pepco transmission line tower will constitute a hazard to air navigation required nothing more than a finding of the physical fact that a 125 foot tall tower occupying airspace through which an airplane must fly will be a hazard to the flight of such airplane, there would be no need for the elaborate

investigatory and hearing procedures provided for in Part 626 of the Administrator's Regulations, nor would such determination necessarily operate "to insure . . . the efficient utilization of such airspace," although it would, of course, operate "to insure the safety of aircraft".

It is our position, as stated above, that the Administrator lacked statutory and constitutional authority to issue the Determination. If, however, it be held that the Administrator did have the necessary authority, then we submit that the Administrator erred in issuing the Determination by reason of the fact that he refused to receive evidence, and made no findings, as to which of the competing claims for the utilization of airspace represented the more "efficient utilization".

#### CONCLUSION

If the Determination is not intended to affect Pepco adversely, that should be made clear, either by revision of its language on remand or by judicial pronouncement, since it otherwise might, in the future, have such an adverse effect despite the lack of intent.

If, on the other hand, the Determination is intended to have an adverse effect on Pepco, then it should be set aside, and the proceedings leading to its issuance dismissed, as in excess of the Administrator's authority under the Act and the Constitution; or, if such authority be found to exist, it should be remanded to the Administrator for further proceedings to determine the efficient utilization of the concerned airspace in the light of the over-all public interest.

Respectfully submitted,

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June 17, 1963.

**PETITIONER'S APPENDIX**

PETITIONER'S APPENDIX

TABLE OF CONTENTS

	Page
Federal Aviation Act of 1958 .....	P.A. 1
Notice of Proposed Rule Making as to Part 626 of Regulations .....	P.A. 17
Part 626 of Regulations .....	P.A. 20
Amendment to Part 626 of Regulation .....	P.A. 38
Further Amendments to Part 626 of Regulations ..	P.A. 39
Part 77 of Regulations (superseding Part 626 effective December 12, 1962) .....	P.A. 41
Senate Report No. 1811, July 9, 1958 .....	P.A. 43
House of Representatives Report No. 2360, August 2, 1958 .....	P.A. 59

P.A. 1

Public Law 85-726  
85th Congress, S. 3880

August 23, 1958

72 Stat. 731, 49 USC §§ 1301-1542

## AN ACT

To continue the Civil Aeronautics Board as an agency of the United States, to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes.

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## TITLE I—GENERAL PROVISIONS

### DEFINITIONS

SEC. 101. As used in this Act, unless the context otherwise requires—

(1) "Administrator" means the Administrator of the Federal Aviation Agency.

(2) "Aeronautics" means the science and art of flight.

• • • • •

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.†

(5) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

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† As amended by PL 87-197, § 3, Sept. 5, 1961, 75 Stat. 467.

P.A. 2

(9) "Airport" means a landing area used regularly by aircraft for receiving or discharging passengers or cargo.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

• • • • •  
(13) "Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

(14) "Civil aircraft" means any aircraft other than a public aircraft.

(15) "Civil aircraft of the United States" means any aircraft registered as provided in this Act.

• • • • •  
(20) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof;

P.A. 3

or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

P.A. 4

(22) "Landing area" means any locality, either of land or water, including airports and intermediate landing fields, which is used, or intended to be used, for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo.

(23) "Mail" means United States mail and foreign-transit mail.

(24) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft.

(25) "Navigation of aircraft" or "navigate aircraft" includes the piloting of aircraft.

(26) "Operation of aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this Act.

(27) "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

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(29) "Possessions of the United States" means (a) the Canal Zone, but nothing herein shall impair or affect the jurisdiction which has heretofore been, or may hereafter be, granted to the President in respect of air navigation in the Canal Zone; and (b) all other possessions of the United States. Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this Act to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

P.A. 5

(30) "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.

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DECLARATION OF POLICY: THE ADMINISTRATOR

SEC. 103. In the exercise and performance of his powers and duties under this Act the Administrator shall consider the following, among other things, as being in the public interest:

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

(b) The promotion, encouragement, and development of civil aeronautics;

(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;

(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;

(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft.

PUBLIC RIGHT OF TRANSIT

SEC. 104. There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States.

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P.A. 6

TITLE III—ORGANIZATION OF AGENCY AND  
POWERS AND DUTIES OF ADMINISTRATOR

CREATION OF AGENCY

GENERAL

SEC. 301. (a) There is hereby established the Federal Aviation Agency, referred to in this Act as the "Agency". The Agency shall be headed by an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall receive compensation at the rate of \$22,500 per annum. The Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Agency, and shall have authority and control over all personnel and activities thereof.  
• • •

QUALIFICATIONS OF ADMINISTRATOR

(b) • • • At the time of his nomination [the Administrator] shall be a civilian and shall have had experience in a field directly related to aviation. The Administrator shall have no pecuniary interest in or own any stock in or bonds of any aeronautical enterprise nor shall he engage in any other business, vocation, or employment.

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ORGANIZATION OF AGENCY

DEPUTY ADMINISTRATOR

SEC. 302. (a) There shall be a Deputy Administrator of the Agency who shall be appointed by the President by and with the advice and consent of the Senate. The Deputy Administrator • • • shall perform such duties and exercise such powers as the Administrator shall prescribe. The Deputy Administrator shall act for, and exercise the powers of, the Administrator during his absence or disability.

## P.A. 7

### QUALIFICATIONS AND STATUS OF DEPUTY ADMINISTRATOR

(b) \* \* \* At the time of his nomination [the Deputy Administrator] shall have had experience in a field directly related to aviation. He shall have no pecuniary interest in nor own any stocks in or bonds of any aeronautical enterprise, nor shall be engaged in any other business, vocation, or employment. \* \* \*

\* \* \* \* \*

### ADMINISTRATION OF THE AGENCY

#### AUTHORIZATION OF EXPENDITURES AND TRAVEL

SEC. 303. (a) The Administrator is empowered to make such expenditures at the seat of Government and elsewhere as may be necessary for the exercise and performance of the powers and duties vested in and imposed upon him by law, and as from time to time may be appropriated for by Congress, including expenditures for \* \* \* (5) membership in and cooperation with such organizations as are related to, or are part of, the civil aeronautics industry or the art of aeronautics \* \* \*; (7) making investigations and conducting studies in matters pertaining to aeronautics \* \* \*.

\* \* \* \* \*

(c) The Administrator, on behalf of the United States, is authorized, where appropriate: \* \* \* (2) within the limits of available appropriations made by the Congress therefor, to acquire by purchase, condemnation, lease, or otherwise, real property or interests therein, including, in the case of air navigation facilities (including airports) owned by the United States and operated under the direction of the Administrator, easements through or other interests in airspace immediately adjacent thereto and needed in connection therewith \* \* \* Any such acquisition by condemnation may be made in accordance with the provisions of the Act of August 1, 1888 (40 U. S. C. 257; 25 Stat. 357), the Act of February 26, 1931 (40 U. S. C. 258a-258e; 46 Stat.

## P.A. 8

1421), or any other applicable Act: *Provided*, That in the case of condemnations of easements through or other interests in airspace, in fixing condemnation awards, consideration may be given to the reasonable probable future use of the underlying land.

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### FOSTERING OF AIR COMMERCE

SEC. 305. The Administrator is empowered and directed to encourage and foster the development of civil aeronautics and air commerce in the United States and abroad.

### NATIONAL DEFENSE AND CIVIL NEEDS

SEC. 306. In exercising the authority granted in, and discharging the duties imposed by, this Act, the Administrator shall give full consideration to the requirements of national defense, and of commercial and general aviation, and to the public right of freedom of transit through the navigable airspace.

### AIRSPACE CONTROL AND FACILITIES

#### USE OF AIRSPACE

SEC. 307. (a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

#### AIR NAVIGATION FACILITIES

(b) The Administrator is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities

## P.A. 9

wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic.

### AIR TRAFFIC RULES

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

### APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

(d) In the exercise of the rulemaking authority under subsections (a) and (c) of this section, the Administrator shall be subject to the provisions of the Administrative Procedure Act, notwithstanding any exception relating to military or naval functions in section 4 thereof.

### EXEMPTIONS

(e) The Administrator from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this title if he finds that such action would be in the public interest.

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## P.A. 10

### EXPENDITURE OF FEDERAL FUNDS FOR CERTAIN AIRPORTS, ETC. AIRPORTS FOR OTHER THAN MILITARY PURPOSES

SEC. 308. (a) No Federal funds, other than those expended under this Act, shall be expended, other than for military purposes (whether or not in cooperation with State or other local governmental agencies), for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area, or for the acquisition, establishment, construction, maintenance, or operation of air navigation facilities thereon, except upon written recommendation and certification by the Administrator that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense. Any interested person may apply to the Administrator, under regulations prescribed by him, for such recommendation and certification with respect to any landing area or air navigation facility proposed to be established, constructed, altered, repaired, maintained, or operated by, or in the interests of, such person. There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.

### LOCATION OF AIRPORTS, LANDING AREAS, AND MISSILE AND ROCKET SITES

(b) In order to assure conformity to plans and policies for allocations of airspace by the Administrator under section 307 of this Act, no military airport or landing area, or missile or rocket site shall be acquired, established, or constructed, or any runway layout substantially altered, unless reasonable prior notice thereof is given the Administrator so that he may advise \* \* \* as to the effects of such acquisition, establishment, construction, or alteration on the use of airspace by aircraft. \* \* \*

### OTHER AIRPORTS

SEC. 309. In order to assure conformity to plans and policies for, and allocations of, airspace by the Adminis-

## P.A. 11

trator under section 307 of this Act, no airport or landing area not involving expenditure of Federal funds shall be established, or constructed, or any runway layout substantially altered unless reasonable prior notice thereof is given the Administrator, pursuant to regulations prescribed by him, so that he may advise as to the effects of such construction on the use of airspace by aircraft.

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### DEVELOPMENT PLANNING

#### GENERAL

SEC. 312. (a) The Administrator is directed to make long range plans for and formulate policy with respect to the orderly development and use of the navigable airspace, and the orderly development and location of landing areas, Federal airways, radar installations and all other aids and facilities for air navigation, as will best meet the needs of, and serve the interest of civil aeronautics and national defense, except for those needs of military agencies which are peculiar to air warfare and primarily of military concern.

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### OTHER POWERS AND DUTIES OF ADMINISTRATOR

#### GENERAL

SEC. 313. (a) The Administrator is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act.

#### PUBLICATIONS

(b) Except as may be otherwise provided in this Act, the Administrator shall make a report in writing on all pro-

ceedings and investigations under this Act in which formal hearings have been held, and shall state in such report his conclusions together with his decisions, order, or requirement in the premises. All such reports shall be entered of record and a copy thereof shall be furnished to all parties to the proceeding or investigation. The Administrator shall provide for the publication of such reports, and all other reports, orders, decisions, rules, and regulations issued by him under this Act in such form and manner as may be best adapted for public information and use. Publications purporting to be published by the Administrator shall be competent evidence of the orders, decisions, rules, regulations, and reports of the Administrator therein contained in all courts of the United States, and of the several States, Territories, and possessions thereof, and the District of Columbia, without further proof or authentication thereof.

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## TITLE IX—PENALTIES

### CIVIL PENALTIES

#### SAFETY AND POSTAL OFFENSES

SEC. 901. (a) (1) Any person who violates (A) any provision of title III, IV, V, VI, VII, or XII of this Act, or any rule, regulation, or order issued thereunder, • • • shall be subject to a civil penalty of not to exceed \$1,000 for each such violation.† • • •

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### CRIMINAL PENALTIES

#### GENERAL

SEC. 902. (a) Any person who knowingly and willfully violates any provision of this Act (except titles III, V, VI, VII, and XII), or any order, rule, or regulation issued by the Administrator • • • under any such provision or any term, condition, or limitation of any certificate or permit

† As amended by PL 87-528, § 12, July 10, 1962, 76 Stat. 149.

P.A. 13

issued under title IV, for which no penalty is otherwise provided \* \* \* shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than \$500, and for any subsequent offense to a fine of not more than \$2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.†

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TITLE X—PROCEDURE

CONDUCT OF PROCEEDINGS

SEC. 1001. The Board and the Administrator, subject to the provisions of this Act and the Administrative Procedure Act, may conduct their proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. \* \* \*

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ORDERS, NOTICES, AND SERVICE

EFFECTIVE DATE OF ORDERS; EMERGENCY ORDERS

SEC. 1005. (a) Except as otherwise provided in this Act, all orders, rules, and regulations of the Board or the Administrator shall take effect within such reasonable time as the Board or Administrator may prescribe, and shall continue in force until their further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: \* \* \*

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COMPLIANCE WITH ORDER REQUIRED

(e) It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Administrator or the Board under this Act affecting such person so long as the same shall remain in effect.

† As amended by PL 87-528, § 13, July 10, 1962, 76 Stat. 150.

## P.A. 14

### FORM AND SERVICE OF ORDERS

(f) Every order of the Administrator or the Board shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

### JUDICIAL REVIEW OF ORDERS

#### ORDERS OF BOARD AND ADMINISTRATOR SUBJECT TO REVIEW

SEC. 1006. (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

#### VENUE

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

#### NOTICE TO BOARD OR ADMINISTRATOR; FILING OF TRANSCRIPT

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.†

† As amended by PL 86-546, § 1, June 29, 1960, 74 Stat. 255.

## P.A. 15

### POWER OF COURT

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the \* \* \* Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.†

### FINDINGS OF FACT CONCLUSIVE

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

### CERTIFICATION OR CERTIORARI

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

### JUDICIAL ENFORCEMENT

#### JURISDICTION OF COURT

SEC. 1007. (a) If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Board or

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† As amended by PL 87-225, § 2, Sept. 13, 1961, 75 Stat. 497.

P.A. 16

Administrator, as the case may be, their duly authorized agents, or, in the case of a violation of section 401 (a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and requiring their obedience thereto.

APPLICATION FOR ENFORCEMENT

(b) Upon the request of the Board or Administrator, any district attorney of the United States to whom the Board or Administrator may apply is authorized to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this Act or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

. . . . .

TITLE XI—MISCELLANEOUS

HAZARDS TO AIR COMMERCE

SEC. 1101. The Administrator shall, by rules and regulations, or by order where necessary, require all persons to give adequate public notice, in the form and manner prescribed by the Administrator, of the construction or altera-

tion, or of the proposed construction or alteration, of any structure where notice will promote safety in air commerce.

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**Notice of Proposed Rule Making**  
(25 F. R. 8911)

Pursuant to the authority delegated to me by the Administrator \* \* \*, notice is hereby given that the Federal Aviation Agency has under consideration a proposal for the adoption of Part 626 of the regulations of the Administrator as hereinafter set forth.

Section 1101 of the Federal Aviation Act \* \* \* provides that the Administrator shall, by rules and regulations, or by order where necessary, require all persons to give adequate public notice, in the form and manner prescribed by the Administrator, of the construction or alteration of any structure where notice will promote safety in air commerce. Section 313(a) of the Federal Aviation Act \* \* \* empowers the Administrator to perform such acts, to conduct such investigations, to issue and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of the Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, the Act. Section 307(a) of the Federal Aviation Act \* \* \* authorizes and directs the Administrator to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. This section further provides that the Administrator may modify or revoke such assignment when required in the public interest.

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With the expansion of the aviation industry the problems presented by the construction or alteration of stru-

tures affecting safety in air commerce have become pressing and can no longer be satisfactorily resolved by presently established criteria and procedures. This is particularly true in view of the fact that the present procedures for the evaluation of proposed construction with regard to possible hazard to air commerce utilize various criteria developed at different times and for different purposes, some of which are regulatory in nature and others are of a policy nature. \* \* \* In addition, no Regulations of the Administrator presently exist establishing procedures for the consideration of the effects of structures upon safety in air commerce.

The only forum for considering this question with specific reference to broadcast structures, was established by Executive Order No. 9781, as amended, which created the Air Coordinating Committee. This Committee established rules of procedure whereby its Regional Subcommittees and Washington Airspace Panel conducted special aeronautical studies of the effect of proposed alteration or construction of broadcast structures and submitted their recommendations to the Federal Communications Commission in accordance with Part 17 of the Commission's rules. It is to be noted at this point that no other forum exists for the consideration of the effect of other tall structures upon safety in air commerce; and further that the Federal Communications Commission's consideration of antenna structures is in connection with the issuance of a construction permit or broadcast permit for broadcast purposes.

\* \* \* \* \*

In drafting the criteria contained in the proposed regulation, it was considered necessary to encompass the construction or alteration of any structure which would affect safety in air commerce to give meaning and effect to the requirement in section 1101 of the Act for notice as to such construction. Such portions of the presently existing criteria as could be adapted were carried forward in com-

bination with proposed changes and additions and incorporated into the text of this proposed regulation. In the development of the proposed criteria, the Agency has given consideration to the requirements for safety in air commerce and at the same time recognition to the requirements of the users of airspace for surface construction.

It is proposed herein to adopt a regulation which would establish when notice of construction must be given and the criteria for the determination of what proposed structures would constitute hazards to air commerce by reason of their location or height. Since such hazard criteria are universal in application, the regulation also provides procedures for giving individual consideration to a specific structure to permit the Agency to determine whether waiver of the criteria as applied to that structure would be consistent with safety of air commerce. These procedures will provide a forum and a means for the Agency to give full consideration to the public interest in safe air commerce and the interests of the construction sponsor.

The Agency contemplates that, in the application of this regulation and the aeronautical studies of specific proposals thereunder, consideration will be given to possible adjustments of aviation requirements to accommodate tall structures. This would include the raising of minimum flight levels and realigning routes, airways and other flight patterns. These studies would also provide for the consideration of possible adjustments to the location and height of proposed structures to eliminate or minimize non-conformance with the criteria.

In these criteria, specific recognition is given to the requirements of the broadcast industry through providing for the regulatory establishment of "antenna farm areas" of specific dimensions of area and height. Antenna proposals or other tall structures to be located within such areas and which would not exceed the established dimensions, are automatically excluded from the category of

aviation hazards. Although no specific antenna farm areas are proposed for establishment in this notice, a subsequent notice of proposed rule making will be issued by the Federal Aviation Agency within the near future wherein specific recognized farm areas now in existence will be proposed for establishment under this regulation.

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**Part 626—Notice of Construction or Alternation: Criteria, Procedures and Rules for Determination of the Effect of Proposed Structures Upon the Use of Navigable Airspace†**

[Preamble or Introductory Statement (26 FR 5287)]

On September 16, 1960, the Federal Aviation Agency published in the Federal Register (25 F.R. 8911) a proposed Part 626 of the Regulations of the Administrator which would establish requirements for notification of the contemplated construction or alteration of structures, criteria and procedures for the determination of the effect of such structures on air navigation, and the establishment of antenna farm areas.

The proposal evoked numerous comments from the aeronautical, television and broadcasting industries as well as railroads, power companies and other utilities, and related manufacturing industries. \* \* \* Due to the complexity of the subject matter of our proposal and its effect upon diverse non-aviation interests, a hearing was held on January 10 and 11, 1961. \* \* \*

A substantial number of comments were directed to the authority and jurisdiction of the Administrator to adopt a regulation on the subject of the heights of structures, particularly such structures as radio and television towers. A brief reference to our statutory authority should be sufficient here. The Federal Aviation Act continued the

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† As effective from July 15, 1961 through December 11, 1962 (except that §§ 626.50 and 626.76(b) and (c) are as amended effective August 25, 1961).

recognition and declaration previously made in the Civil Aeronautics Act of the "public right of freedom of transit through the navigable airspace of the United States." In addition, the Act authorizes and directs the Administrator to regulate the use of the navigable airspace in order to insure aircraft safety and efficient utilization and to require notice of the proposed construction or alteration of any structure where such notice would promote air safety. These, and the other authorities referred to in the notice of proposed rule making, provide an ample basis for the regulatory action being taken here. This regulation not only constitutes a proper measure to carry out the purposes of the Act, but, under the circumstances, is required if we are to properly perform the responsibilities and duties entrusted to us by the Congress.

While substantial revision of the proposal was effected in the light of the comment received, Part 626 as adopted follows the general form of the proposal. Notification must be provided the Agency when the construction or alteration of a structure in excess of any of the specified heights is contemplated. Mathematical criteria are provided as guides for determining the effect proposed structures would have on air navigation. Procedures are provided for the conduct of informal airspace studies and hearings on whether specific construction proposals would constitute hazards to air navigation. Antenna farm areas will be established for the grouping of radio and television towers to decrease their use of the navigable airspace.

Several comments indicated a doubt as to the effect of the regulation on existing structures and on other Agency regulations relating to obstructions to air navigation. These points have been clarified by the addition of a section to emphasize that this regulation does not apply to structures in existence on its effective date and to clarify its effect on other Agency criteria.

Several parties suggested limitations on the requirement to notify the Agency of the proposed construction or alter-

ation of a structure. A provision has been incorporated in the regulation which will permit immediate action with minimum notice in any emergency involving essential public service, public health or safety. In a related notification area, the Agency found itself unable to comply with a request for relaxation of the requirement for additional notice at the time the new construction or alteration is erected to a height which would equal the original criteria. This notice is necessary to permit placing the new structure on charts used in air navigation. Such charting may not be accomplished on the basis of the initial notice since many proposed structures are never erected.

Many objections were voiced to the criteria which would determine hazards to air navigation and to the procedure by which these criteria would be applied. The regulation adopted does not brand immediately as hazards all proposed construction which would exceed the criteria but, rather, provides that the offending proposal would require only a preliminary determination of hazard, which preliminary determination would expire upon the initiation of an aeronautical study. Similarly, the objective of the study will be to determine whether the contemplated construction would, in fact, result in a hazard to air navigation. If the study discloses a hazard would not be created, the final determination will so state. Consequently, the provision for the granting of exemptions to the criteria has been eliminated.

The criteria established in the regulation are more lenient than those contained in the notice. \* \* \*

The procedures for the conduct of informal aeronautical studies are adopted substantially as proposed in the notice. These procedures are similar to those previously followed by the Air Coordinating Committee with the added feature that the construction sponsor is allowed to participate with all other interested persons in the discussion of the proposal and the material submitted in support of it and of

the aeronautical objections to it. Upon review of the comments in favor of a full transcript of these proceedings, it was determined that the benefits to be derived by the Agency would not be sufficient to justify the expense involved. The Agency does intend to take stenographic notes of these discussions and retain a summary of the studies based on these notes. Further, the procedures do not bar an interested party from providing his own means of recording the proceedings, or any portion of them, if he so desires.

The procedures proposed for the conduct of hearings on construction or alteration proposals contained many features designed to provide detailed protection of the rights of each participant. No person who commented endorsed these procedures and many attacked them as being unduly complicated. The Agency proposed these procedures with some reluctance, being aware that hearings conducted in accordance with them would consume substantial periods of time. In view of the public reaction, a simplified proceeding has been substituted by which these hearings may be expedited.

In the procedures governing both the informal aeronautical studies and the hearings, provision is made for the possible adjustment of (1) aviation requirements to accommodate the construction proposals and (2) the location and height of the proposed structures to eliminate or minimize their effects on air navigation. It is expected that a very large proportion of the conflicts between proposed structures and air navigation for the use of navigable airspace will be resolved in these informal studies and that a relatively small number will require a hearing.

Several comments were directed to the provision in the proposal for the establishment of antenna farm areas. We believe that proper fulfillment of our statutory responsibilities must include the promulgation of regulations which will lessen the detrimental effect of tall structures on the

use of the navigable airspace. The grouping of antenna structures is, obviously, such a measure. However, much of its beneficial effect could be lost if the farm areas established were not compatible with the over-all needs of the broadcast industry. Accordingly, this portion of our proposal has been revised to include an affirmative requirement that the views of the Federal Communications Commission will be requested before any antenna farm area is established and that such views will be given full consideration prior to any FAA action.

In consideration of the foregoing, Part 626 of the Regulations of the Administrator is adopted as follows:

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 AUTHORITY: §§ 626.1 to 626.1060 issued under secs. 104, 307, 313, 1001, and 1101, 72 Stat. 740, 749, 752, 788, and 797; 49 U.S.C. 1304, 1348, 1354, 1481, 1501.

#### SUBPART A—INTRODUCTION

##### § 626.1 Basis and purposes.

(a) The basis of this part is found in Titles I, III, X and XI of the Federal Aviation Act of 1958, as amended.

(b) The purposes of this part are as follows:

(1) To require all persons to give adequate public notice of the proposed construction or alteration of any structure where notice will promote safety in air commerce and to prescribe the form and manner of such notice.

(2) To establish criteria for the determination of whether proposed structures would be hazards to air navigation.

(3) To provide for the conduct of, and prescribe the procedures for, aeronautical studies of proposals for the erection of new or alteration of existing structures which would exceed the criteria herein; to determine the effects of such structures upon the safety of aircraft in flight and

the efficient utilization of airspace; and to prescribe the manner of issuance and publication of the determinations of such aeronautical studies.

(4) To provide for the initiation and conduct of public hearings for the purpose of making Final Determinations as to whether specific construction proposals would result in hazards to air navigation; to prescribe the rules and procedures for conducting such hearings; and to prescribe the manner of issuance and publication of the resulting orders.

(5) To establish antenna farm areas at prescribed geographical locations and with specified dimensions of area and height.

§ 626.2 Definitions.

As used in this part, terms are defined as follows:

(a) "Administrator" means Administrator, Federal Aviation Agency.

(b) "Agency" means Federal Aviation Agency.

(d) "Airport" means a landing area used regularly by aircraft for receiving or discharging passengers or cargo.

(k) "Determination" means a decision issued by an Air Traffic Management Field Division or by the Obstruction Evaluation Branch as to the effect upon air navigation of a specific construction proposal, from an airspace utilization standpoint, which becomes a Final Determination if no appeal therefrom is granted.

(l) "Final determination" means a determination of the Agency from which no appeal is granted, or an order of the Administrator issued as a result of a public hearing with respect to a specific construction proposal.

(q) "Landing area" means any locality, either land or water, including airports and intermediate landing fields, which is used or intended to be used for the landing and take off of aircraft, whether or not facilities are provided for the shelter, servicing or repair of aircraft, or for receiving or discharging passengers or cargo.

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(u) "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic (including a federal, state or local Government agency); and includes any trustee, receiver, assignee, or other similar representative thereof.

(v) "Public notice" means notice to the Administrator as prescribed in § 626.9.

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(x) "Structure" means any form of construction or apparatus of a permanent or temporary character, including any implements or material used in the erection, alteration, or repair of such structure.

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§ 626.3 General.

(a) This part does not apply to structures in existence on its effective date, except with respect to any alteration to such structures after the effective date.

(b) The criteria in this part apply only in determining the effect construction proposals would have on air navigation from an airspace utilization standpoint, and do not supersede the criteria contained in Parts 609 or 610 of this chapter or in Technical Standard Order of the Administrator, TSO-N18, as to their intended uses.

**SUBPART B—REQUIREMENTS FOR NOTICE OF PROPOSED CONSTRUCTION OR ALTERATION; HAZARDS TO AIR NAVIGATION CRITERIA**

**§ 626.8 Scope and effect of subpart.**

(a) This subpart establishes the requirement for all persons to give adequate public notice of proposed construction or alteration of certain structures; specifies the location and dimensions of structures for which notice is required; prescribes the form and manner of such notices; and establishes criteria for the evaluation of the effect of such proposed construction or alteration on air navigation.

(b) The data received in such notices will provide information for charting and other notification to airmen of the new or altered structures. The criteria herein will be applied to establish which construction proposals requiring notice would result in hazard to air navigation unless, upon an aeronautical study under this part, a determination is made that such construction would not constitute a hazard.

**§ 626.9 Structures requiring notice.**

(a) Any person proposing to engage in the construction or alteration of any of the following shall give notice thereof to the Administrator in the form and manner prescribed in this subpart:

(1) Any structure which would be higher than one hundred and fifty feet above the construction site ground level, or above mean water level where the structure will be situated in or over water.

(2) Any structure within 15,000 feet of the boundary of any airport or other landing area, excluding heliports, which would extend above such airport or landing area elevation, or above the construction site ground level or mean water level where the structure will be situated in or over water, whichever is higher, more than one foot ver-

tically for each one hundred feet or fraction thereof of the horizontal distance from the structure to the airport or landing area boundary.

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(4) Any structure which would extend into an "airport or landing area approach plane".

(i) For purposes of this part an "airport or landing area approach plane" is defined as an imaginary surface extending from each end of any airport runway having a length of 2,000 feet,<sup>1</sup> or greater, longitudinally centered on the extended centerlines thereof, for a distance of 1,000 feet at the elevation of the approach end of the runway and thence sloping upward at a ratio of 1 to 60 but not to extend above the limits established in paragraph (2) of this subsection nor beyond 10,000 feet from the runway end.

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(b) For non-instrument approach runways having a length of 2,000 up to but not including 5,000 feet, the width of the approach plane is 500 feet at the end adjacent to the runway and expands uniformly at a ratio which would reach a width of 3,000 feet at a distance of 10,000 feet from the end of the runway.

(5) Any structure within 500 feet of the centerline of any runway.

(6) Any structure more than 500 feet from runway centerline which would project above an inclined plane extending upward from the ground from a base line 500 feet either side of and parallel with each runway centerline, sloping upward and away from the runway at a ratio of 1 to 7 to a height of 150 feet above airport elevation.

(7) Any structure which would project above an inclined plane which extends upward and away from the

<sup>1</sup> Runway lengths referred to in this part are measured runway lengths corrected as prescribed in Technical Standard Order of the Administrator, TSO-N6B (§ 551.6 of this title).

outer edge of an "airport or landing area approach plane" at a ratio of 1 to 7 until it intersects the limits described in subsection (2) of this section, but not to exceed a height of 150 feet above airport elevation.

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 § 626.10 Form and time of notice.

(a) Notices required under § 626.9 shall be submitted to the agency in triplicate on Form FAA-117, "Notice of Proposed Construction or Alteration," not less than 30 days prior to the date, (1) the construction or alteration is proposed to begin, or (2) an application for a construction permit is to be filed, whichever is earlier: *Provided*, that notices relating to proposed construction subject to the licensing requirements of the Federal Communications Act may be submitted to the Agency at the time the application for construction permit is filed with the Federal Communications Commission.†

(b) In case of an emergency involving essential public service, public health or safety, which would require immediate construction or alteration, the 30 day requirement in subsection (a) of this section will not apply and such notice may be communicated by telephone, telegraph or other expeditious means. The executed Form FAA-117 shall be submitted within 5 days thereafter.

(c) All "Notices of Proposed Construction or Alteration," shall be submitted to the Chief, Air Traffic Management Field Division of the nearest Regional Office of the Federal Aviation Agency, or to the Chief, Airspace Utilization Division, Federal Aviation Agency, Washington 25, D.C.

§ 626.11 Acknowledgment of notice.

(a) The Agency will acknowledge receipt of notices submitted under § 626.9.

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† As amended by "Form and Time of Notice" amendment issued on July 15, 1961 (see below).

(b) If a proposed structure would not exceed the criteria of hazards to air navigation set forth in § 626.12, the acknowledgment will contain a statement to this effect and a request that the acknowledging office be notified when the structure, during construction, reaches the minimum height requiring notice under § 626.9.

(c) If a proposed structure would exceed any of the criteria of hazards to air navigation set forth in § 626.12, the acknowledgment of notice will include:

(1) A statement advising the construction sponsor that a structure erected at the location and to the height described in the notice would violate specified criteria and that, consequently, a preliminary determination had been made that such structure would be a hazard to air navigation.

(2) Where appropriate, a statement of possible modification of the construction proposal which would eliminate violation of the criteria.

(3) A statement that the construction sponsor may request the Agency, within thirty (30) days of the date of the acknowledgment, to conduct an aeronautical study of the noticed construction proposal or an amended proposal and that the preliminary determination of hazard would expire upon initiation of an aeronautical study.

(4) A notification that the preliminary determination of hazard would become final unless a request for an aeronautical study was received within thirty (30) days of the date of the acknowledgment or an aeronautical study was initiated within sixty (60) days of such date.

§ 626.12 Hazards to air navigation—criteria.

(a) With the exception of any structure to be erected entirely within the confines of an antenna farm area established in Subpart E of this part, any proposed structure which is the subject of a notice submitted under § 626.10

and which would extend above any of the following criteria would ultimately be determined to be a hazard to air navigation unless, upon an aeronautical study of the structure under this part, the Agency finds that notwithstanding violation of criteria, such construction would not constitute a hazard.

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(6) Any airport imaginary surface as defined in § 626.13.

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§ 626.13 Airport imaginary surfaces—definitions.

(a) The following airport imaginary surfaces are established for airports and other landing areas based upon the length of the longest runway:

(1) *Inner horizontal surface.* The inner horizontal surface is a circular plane, 150 feet above the established elevation of the landing area having a radius from the airport reference point as follows:

(i)  $2\frac{1}{2}$  miles (13,200 feet)—runways 5,000 feet or greater in length.

(ii)  $1\frac{1}{2}$  miles (7,920 feet)—runways 2,000 feet up to but not including 5,000 feet in length.

(iii) 1 mile (5,280 feet)—runways less than 2,000 feet in length.

• • • • •

(b) The following airport imaginary surfaces are established for runways as follows:

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(2) *Non-instrument approach area surface.* A non-instrument approach area surface is a plane longitudinally centered on the extended runway centerline. All runways for which no instrument approach with "straight-in" landing minimums is prescribed will have non-instrument ap-

proach area surfaces at each end with the following dimensions:

(i) For runways 5,000 feet or greater in length—beginning at the end of the runway and extending 500 feet outward at the elevation of the approach end of the runway and then sloping upward at a ratio of 1 to 50, having a width of 1,000 feet at the beginning and expanding uniformly to a width of 4,000 feet at the outer extremity, 10,000 feet from the end of the runway.

(ii) For runways 2,000 feet up to but not including 5,000 feet in length—beginning at the end of the runway and extending 500 feet outward at the elevation of the approach end of the runway and then sloping upward at a ratio of 1 to 40, having a width of 500 feet at the beginning and expanding uniformly to a width of 3,000 feet at the outer extremity, 10,000 feet from the end of the runway.

(iii) For runways less than 2,000 feet in length—beginning at the end of the runway, at the elevation of the approach end of the runway and sloping upward at a ratio of 1 to 20, having a width of 250 feet at the beginning and expanding uniformly to a width of 2,000 feet at the outer extremity, 10,000 feet from the end of the runway.

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#### SUBPART C—PROCEDURES FOR AERONAUTICAL STUDIES OF THE EFFECT OF PROPOSED CONSTRUCTION ON THE USE OF THE NAVIGABLE AIRSPACE

##### § 626.30 Scope and effect of subpart.

(a) This subpart establishes the procedures to be applied in the initiation and administrative processing of informal aeronautical studies of the effect of proposed structures on the use of the navigable airspace by aircraft. Whenever such a study is undertaken, its conclusion will normally be a Determination as to whether the specific construction proposal under consideration would be a hazard to air navigation.

P.A. 33

§ 626.31 Initiation of aeronautical studies.

(a) Aeronautical studies of the effects upon the use of the navigable airspace which would result from the construction or alteration of structures to heights exceeding the hazards to air navigation criteria in § 626.12, will be initiated by the Agency when:

- (1) The sponsor of such proposed construction or alteration, noticed in compliance with § 626.9, requests it, or
- (2) The Agency determines it appropriate.

§ 626.32 Agency Regional Office procedures for aeronautical studies.

(a) When an aeronautical study is initiated, the Air Traffic Management Field Division of the Region within which the construction is proposed will notify all known interested persons, including the construction sponsor, by informal circularization, that the proposed construction is the subject of an informal aeronautical study. The notification circular will include sufficient details of the proposed structure to provide the basis for the study, such as location by geographical coordinates, height above ground, and height above mean sea level, and will solicit aeronautical comment on the proposal.

(b) Should the ATM Field Division find no substantial aeronautical objection to the construction proposal in comments responding to the circular or from its own analysis, that Division will then notify the construction sponsor by letter of its determination that the proposed construction would not result in a hazard to air navigation. Copies of this letter will be distributed to all known interested persons. In the event that the proposed structure is to be used for or in connection with communications, copies of this letter will also be transmitted to the Secretary, Federal Communications Commission.

(c) Should the ATM Field Division find substantial aeronautical objection to the proposed construction in the com-

ments filed by any person in response to the circular or as a result of its own analysis of the proposal, the following procedures will apply:

(1) The ATM Field Division will furnish all interested persons, including the construction sponsor, written notification of an informal meeting to be held at the FAA Regional Office at which the aeronautical study of the proposed construction would be an agenda item. A designated Agency representative will preside at such meetings. Any interested person may attend in person or be represented by attorney or other authorized representative, and may introduce at the meeting such material, oral presentation or written statements as may be pertinent to the aeronautical study of the proposed structure. In addition to the evaluation of the effect of the proposed construction on air navigation, the purposes of such a meeting are to explore aeronautical objections to the proposal, to attempt to develop recommendations for adjustments in aviation requirements which would accommodate the proposed construction, and to examine possible modification of the proposed construction, including revisions of the proposal which would eliminate the violation of criteria.

(2) A summary report of this informal consideration of the proposed structure and recommended conclusions regarding the effect of the proposed structure upon the use of the navigable airspace will be prepared by the ATM Field Division and forwarded, together with copies of all pertinent written material and statements received in response to the circular and in the informal meeting, for review by the Obstruction Evaluation Branch of the Airspace Utilization Division.

§ 626.33 Agency Washington Office review and issuance of determinations.

(a) Based upon its review and analysis of each report of informal aeronautical study received from the ATM Field Division, the Obstruction Evaluation Branch will

evaluate each such construction proposal as to its effect upon the safe and efficient utilization of airspace by aircraft, and issue a determination as to whether the proposed construction would be a hazard to air navigation. Such determination shall include appropriate findings and copies will be distributed to the construction sponsor and other interested persons, including the Secretary of the Federal Communications Commission, if appropriate. The determination will be published in the **FEDERAL REGISTER**. Each determination becomes a final determination unless an appeal therefrom under § 626.34 is granted.

§ 626.34 Petitions for public hearing.

(a) The sponsor of a proposed construction project or any person who stated substantial aeronautical objection to the proposed construction in the informal aeronautical study may file a petition with the Administrator within 30 days of the date of issuance of the determination, for a public hearing for the purpose of obtaining a formal decision of the Administrator on the matter.

(b) Petitions under this section must be filed in triplicate and shall contain a full statement of the basis for the petition.

(c) Such petition will be ruled upon by the Administrator as to whether the substance of the petition has adequate foundation, and a hearing will be granted or denied on the basis of the Administrator's ruling.

§ 626.35 Effective period of Agency final determinations of no hazard.

(a) Unless otherwise revised or terminated, each final determination that proposed construction would not be a hazard to air navigation under this subpart or Subpart D of this part will expire eighteen (18) months after its effective date or upon abandonment of the proposed construction, whichever may occur sooner. Where construction has not been commenced during the 18-month period any in-

interested person may petition the Administrator for (1) a revision of such final determination upon the development of new facts which alter the basis upon which the determination was made, or (2) an extension of the effective period of the determination. The Administrator will provide an appropriate review of the petition and the facts upon which it is based and will revise, extend or reaffirm the determination as indicated by his findings.

**SUBPART D—RULES OF PRACTICE IN HEARINGS ON PROPOSED CONSTRUCTION OR ALTERATION OF STRUCTURES**

**§ 626.50 Applicability of subpart.**

The provisions of this subpart shall govern all hearings conducted by the Federal Aviation Agency under authority of Titles III and X of the Federal Aviation Act of 1958 on the proposed construction or alteration of structures which affect the use of the navigable airspace.

**NOTE:** Any findings entered hereunder are without prejudice to the jurisdiction of the Federal Communications Commission to grant or deny applications for construction permits under the Communications Act of 1934, as amended.†

**§ 626.51 Nature of hearing.**

Hearings conducted on the proposed construction or alteration of structures in order to determine the effect of such construction or alteration upon the safety of aircraft and the efficient utilization of the navigable airspace are purely fact-finding in nature and, therefore, are not subject to the provisions of sections 4, 5, 7 and 8 of the Administrative Procedure Act. As a fact-finding procedure, the hearing is non-adversary and there are no formal pleadings or issues and no adverse parties.

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† "Note" added by "Miscellaneous Amendments" effective August 25, 1961 (see below).

SUBPART E—ESTABLISHMENT OF ANTENNA FARM AREAS

§ 626.75 Scope and effect of subpart.

(a) This subpart establishes antenna farm areas in which antenna structures may be sited for the purpose of grouping such structures to localize their effect upon the use of the navigable airspace. The hazard criteria of § 626.12 will not apply to structures which will be located entirely within the confines of an established antenna farm area.

(b) It is the policy of the Agency to encourage the use of the antenna farm and the single structure multiple antenna concept for radio and television towers wherever possible. In studying proposals for the establishment of antenna farm areas, the Agency will give every consideration possible to the revision of aeronautical procedures and operations to accommodate antenna structures which would fulfill the broadcaster's requirements.

§ 626.76 General.

(a) An antenna farm area is an area at a specified geographical location with established dimensions of area and height where antenna towers having a common impact on aviation may be grouped.

(b) Each proposal for an antenna farm area will be evaluated on the basis of its effect on the use of the navigable airspace. The views of the Federal Communications Commission with respect to the effect of the establishment of each proposed antenna farm area on the statutory responsibilities of the Commission will be requested, and any views submitted will be granted full consideration, prior to the establishment of any such area. If the Commission advises that establishment of the proposed antenna farm area would interfere with its statutory responsibilities, the proposed area will not be established.†

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† Last sentence added by "Miscellaneous Amendments" effective August 25, 1961 (see below).

(c) An antenna farm area will be considered for establishment when proposed by the Agency, the Federal Communications Commission, the sponsor of a proposed antenna tower, or any person having a substantial interest in any such proposed tower.†

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**Amendment to Part 626**

**FORM AND TIME OF NOTICE** (amendment effective  
July 15, 1961)

[Preamble or Introductory Statement (26 FR 6544)]

• • • • •

“In implementation of the authority granted the Administrator by section 1101 of the Federal Aviation Act to require notice of the proposed construction or alteration of any structure where notice would promote safety in air commerce, Part 626 requires in § 626.10 that notice of these construction proposals must be submitted to the Agency not less than 30 days prior to the date the construction is to begin or an application for a construction or broadcast permit is to be filed, whichever is earlier. The provision for 30 days advance notice was included so that the FAA processing of the construction proposals might be initiated and, in some cases completed, prior to the filing for other permits which the applicant might later determine should be revised in the light of the FAA determination.

Several segments of the broadcast industry objected to this provision on the ground that the requirement for notice 30 days prior to the filing of an application for a construction permit with the Federal Communications Commission would cause them substantial hardship. The Agency review of the comments submitted on this point did not reveal a justifiable basis for the deletion of the requirement. However, since the adoption of the rule, additional comment has been received from industry and support of these comments has been advanced informally by the FCC.

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† As amended by “Miscellaneous Amendments” effective August 25, 1961 (see below).

The Commission has indicated that deletion of the advance notice provision should not operate to the detriment of either the Agency or the Commission. From the FCC representations, it appears that applications for construction permits filed with the Commission and Notices of construction proposal filed with the Agency may be processed concurrently without adversely affecting the proper discharge of the statutory responsibilities of the two federal agencies.

The considerations applicable to our conclusion regarding FCC applications do not exist with respect to applications for other types of permits with other government bodies. The possible difficulties in effecting necessary coordination with the many political subdivisions below the federal level requires that we retain the provision for advance notice in all other cases. Accordingly, this revision is limited to notices for structures requiring FCC approval."

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#### Further Amendments to Part 626

MISCELLANEOUS AMENDMENTS (effective August 25, 1961)

[Preamble or Introductory Statement (26 FR 8171)]

Part 626 was adopted on June 12, 1961 (26 F.R. 5287), to establish requirements for notification to the Federal Aviation Agency of proposed structures which would project into the navigable airspace, provide criteria and procedures for determining the effect of such structures on air navigation, and provide for the establishment of antenna farm areas where tall towers could be grouped to lessen their impact on the use by aircraft of the navigable airspace.

The adoption of Part 626 was accompanied and followed by discussions with the Federal Communications Commission to coordinate FAA operations under the new regulations with the activities of the Commission in the issuance of construction permits for antenna towers under the Com-

(c) An antenna farm area will be considered for establishment when proposed by the Agency, the Federal Communications Commission, the sponsor of a proposed antenna tower, or any person having a substantial interest in any such proposed tower.†

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The adoption of Part 626 was accompanied and followed by discussions with the Federal Communications Commission to coordinate FAA operations under the new regulations with the activities of the Commission in the issuance of construction permits for antenna towers under the Com-

munications Act of 1934. The amendments which follow implement the conclusions reached in those discussions.

For a number of years the FCC Rules have exempted from their requirements for special aeronautical study all antenna structures of 20 feet or less in height. The Commission advises that operations under this exemption have been advantageous to both Government and industry. An Agency review has disclosed that exclusion of this type of structure from the application of Part 626 should not derogate the performance of the Agency functions under the Federal Aviation Act. Accordingly, Part 626 is amended herein to except antennas not exceeding 20 feet in height. A minor amendment is also being adopted at this time to except certain air navigation aids and related devices.

The FAA-FCC discussions underscored the existence of uncertainty in the broadcast industry with respect to the effect on FCC jurisdiction of the Agency findings made subsequent to the hearings held under Subpart D. These hearings are conducted to determine the effect of proposed structures upon the safety of aircraft and the efficient utilization of the navigable airspace. The findings made form the basis for a determination as to whether a proposed structure would, in fact, result in a hazard to air navigation. While we regard this determination as a final one on the question of air hazard, our findings should not be construed to prejudice the exercise by the Commission of its statutory jurisdiction, particularly its authority to determine whether a construction permit for such a structure should be issued. Accordingly, we are promulgating an expression of our opinion on this point. This conclusion should not be interpreted as an attempt to settle any justiciable rights which may be the subject of later controversy. Any individual who believes an FAA or FCC action has deprived him of one or more rights may apply, of course, to the appropriate court for a review and decision on the matter.

In the adoption of the regulations providing for the establishment of antenna farm areas, a provision was included under which the views of the Federal Communications Commission would be considered prior to establishment of a particular farm area. In order to remove any doubt regarding the weight which this Agency would give those views, an amendment is made here to state specifically that a proposed antenna farm area will not be established if the FCC advises that the establishment would interfere with its statutory responsibilities. Similarly, while the FAA would consider the establishment of any farm area when proposed by the FCC, Part 626 did not expressly reveal this in its original form. Consequently, it is now being revised to include the Federal Communications Commission in the list of those agencies which may propose the establishment of an antenna farm area.

Since these amendments either reduce a burden on the public or are editorial in nature, notice and public procedure hereon are unnecessary and they may be made effective immediately.

In consideration of the foregoing, Part 626 of the regulations of the Administrator is hereby amended as follows:

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**Part 77—Notice of Construction or Alteration Affecting Navigable Airspace [New]†**

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**§ 77.37 Headquarters review and issue of determination.**

(a) Based on its review and analysis of the report made under § 77.35, the Obstruction Evaluation Branch evaluates each construction or alteration proposal as to its effect on the safe and efficient use of airspace by aircraft. The Chief of that Branch issues a determination as to whether it would be a hazard to air navigation, including appropri-

† Part 77 became effective on December 12, 1962 as part of Subchapter E [New] of Chapter I of Title 14 of the Code of Federal Regulations. It superseded Part 626.

ate findings. He sends copies of the determination to the sponsor of the construction or alteration and each other interested person (including the Secretary of the Federal Communications Commission, if appropriate), and publishes it in the Federal Register.

(b) A determination made under this section is final unless an appeal from it is granted under § 77.39 [sic].

§ 77.39 Petitions for public hearing.

(a) The sponsor of any proposed construction or alteration, or any person who stated a substantial aeronautical objection to it in the study made under § 77.35 may petition the Administrator, within 30 days after the date the determination is issued under § 77.39, for a public hearing to obtain a formal decision of the Administrator on the matter.

(b) The petition must be in triplicate and must contain a full statement of the basis for it.

(c) The Administrator determines whether there is adequate grounds for the substance of the petition and grants or denies a hearing on that basis.

§ 77.41 Effective period of determination of no hazard.

(a) Unless it is otherwise revised or terminated, each final determination, made under this subpart or Subpart E of this Part, that proposed construction or alteration would not be a hazard to air navigation, expires 18 months after its effective date or upon the date the proposed construction or alteration is abandoned, whichever is earlier.

(b) In any case where the proposed construction or alteration has not been started during the 18-month period any interested person may petition the Administrator to—

(1) Revise the final determination based on new facts that alter the basis upon which the determination was made; or

(2) Extend the effective period of the determination.

(c) The Administrator provides an appropriate review for each petition and the facts upon which it is based, and revises, extends, or reaffirms the determination as indicated by his findings.

SUBPART E—RULES OF PRACTICE FOR HEARINGS UNDER  
SUBPART D

§ 77.51 Scope.

This subpart applies to hearings held by the FAA under Titles III and X of the Federal Aviation Act of 1958 (49 U.S.C. Subchapters III and X), on proposed construction or alteration that affects the use of navigable airspace.

§ 77.53 Nature of hearing.

Sections 4, 5, 7, and 8 of the Administrative Procedure Act (5 U.S.C. 1003, 1004, 1006, and 1007) do not apply to hearings held on proposed construction or alteration to determine its effect on the safety of aircraft and the efficient use of navigable airspace because those hearings are fact-finding in nature. As a fact-finding procedure, each hearing is nonadversary and there are no formal pleadings or issues and no adverse parties.

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Senate Report No. 1811, July 9, 1958

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The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 3880) to create an independent Federal Aviation Agency, to provide for the safe and efficient use of the airspace by both civil and military operations, and to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, having considered the same, report favorably thereon with amendments and recommended that the bill as amended do pass.

## I. SUMMARY OF THE BILL

The present measure, to be cited as the Federal Aviation Act of 1958, reenacts the Civil Aeronautics Act of 1938 substantially changed to create a separate Federal Aviation Agency. The Administrator of the new Agency (1) would be given full responsibility and authority for the advancement and promotion of civil aeronautics generally, including the promulgation and enforcement of safety regulations, and (2) would be charged with the management of the national airspace, including responsibility for prescribing air traffic rules and for the development and operation of air navigation facilities. Appropriate military participation in the latter function is also provided for.

In addition, the bill makes technical and perfecting amendments in existing aviation law, to conform to the new organization.

## II. TITLE-BY-TITLE SUMMARY

*Title I. General provisions:* Contains no important changes in existing law. The list of definitions has been amended in several respects to accommodate substantive changes made by the proposed act, to reflect current judicial interpretations, or to delete obsolete material.

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*Title III. Organization of Agency and powers and duties of Administrator:* Is almost entirely new. It establishes a new Federal Aviation Agency under the direction of a civilian Administrator and a Deputy Administrator who may be a member of the Armed Forces. Both shall be appointed by the President, by and with the advice and consent of the Senate.

The Administrator is empowered to regulate the use of the navigable airspace; to acquire, establish, operate, and improve air navigation facilities; to prescribe air traffic rules for all aircraft; and to conduct related research and

development activities. In addition, his approval would be required for the location or substantial alteration of any military or civilian airport, or rocket or missile site, involving the expenditure of Federal funds. Prior notice to him would also be required for the construction of any other landing area. Provision is made for exceptions and for a general exemption from the Administrator's air traffic control powers in case of a military emergency.

In the exercise of these functions the Administrator is to be assisted by a staff of military personnel. The President may also transfer military air traffic control functions and personnel to the Agency. Provision is made for future reports to Congress on the effective employment of military staff personnel as well as with regard to special problems involving the status of operational personnel. A special study on legislation for wartime operations is also called for .

Title III also extends appropriate administrative powers and duties to the Administrator including provisions for the employment, training, and transfer of personnel; for delegation of functions; acquisition and transfer of property and appropriations; collection of information; conduct of hearings and investigations; and publication of required reports.

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*Title XII. Miscellaneous:* Contains no substantial revision of sections dealing with hazards to air commerce, the applicability of international agreements, and use of documents filed.

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### III. THE NEED FOR NEW AVIATION LEGISLATION

#### A. THE NEW FRONTIER

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Twenty years ago the airplane still played an essentially supplementary, or exceptional, role in our economy. Today, aviation is "big business" with our Nation's airways

serving as principal arties of commerce and recreation. With the imminent advent of civil jet operations we will take another giant step in the ever-greater exploitation of this buoyant resource aloft. The steady advance of the American frontier has never halted; it is now merely proceeding in a new direction. And, unfortunately, the frontier still appears to be as much in need of law and order as ever.

#### B. DIFFUSION OF FEDERAL REGULATION

As pointed out by Stuart Tipton, president of the Air Transport Association, aviation is unique among transportation industries in its relation to the Federal Government—it is the only one whose operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest. How well has this responsibility been discharged?

Your committee would not answer this question favorably in view of the following paradoxical development:

While the problems and stresses inevitably brought about by the rapid growth of civil aviation and increased airways utilization have become ever more concentrated and acute, the authority to deal with them has become correspondingly more scattered and diffused.

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#### *Subordination and coordination*

The Civil Aeronautics Administration retained the responsibility for day-to-day management of the skyways, and thus was the one agency whose voice was most to be heeded in planning the expansion and modernization of aviation facilities. However, buried deep in the Department of Commerce, a conscientious Administrator's pleas

for even a minimum of urgently required improvements were too often ignored or overruled by disinterested or preoccupied departmental superiors or by economy-minded budget officials.

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As a result of these developments, it is fair to say that during the critical postwar period proper development planning for civil aeronautics was often stifled by subordination to other interests or neutralized in the process of coordination.

#### C. THE AIR TRAFFIC CONTROL CRISIS

Nowhere did the twin evils of subordination and coordination produce more unfortunate results than in the highly critical field of air-traffic control and air-navigation-facilities planning. With an increasing number of faster planes crowding our airways each year, making general reliance on the old flight rule of "see and be seen" ever more hazardous, the need to revamp completely our outmoded traffic-control system became acute. Yet, year after year, CAA's requests for funds to buy long-range radar and other equipment necessary to permit a higher degree of positive traffic control were denied by the Department of Commerce or the Bureau of the Budget.

At the same time, it became obvious that a modern electronic system of control would require joint civil-military planning. Coordination in this area—the development of a so-called "common system"—was largely the responsibility of an Air Navigation Development Board composed of representatives from the Departments of Commerce and Defense, each department exercising a veto. One of chief results of this type of "coordination" was the now famous TACAN-VOR/DME fiasco which involved the expenditure of millions of dollars for the planning and development of a military air-navigation system that was essentially in-

compatible with the system being developed by civil authorities.

As a direct result of these circumstances, the bleak fact is that our airways-control system is largely inadequate for present civil and military needs. This is the price we are now paying for years of diffusion, confusion, and a bargain-basement approach to the problems of aeronautical development.

#### IV. BACKGROUND OF THE PRESENT MEASURE

##### A. RECENT STUDIES

Fortunately, in the past 2 or 3 years, there has come about a wide-spread recognition of the inadequacy of aviation planning. \* \* \*

In the executive branch a review of aviation-facilities problems was undertaken in 1955 by William B. Harding for the Bureau of the Budget. As a result of his recommendations the President appointed Gen. Edward C. Curtis to undertake a comprehensive study of how to bring about unified facilities planning. \* \* \*

The most significant part of the Curtis report, however, was its recognition of broader organizational deficiencies and its confirmation of the need—a need which was previously recognized in the Congress—for establishment of an independent Federal Aviation Agency with plenary authority over the Nation's airspace into which would be consolidated all essential aeronautical management functions. This proposal thus finally came to grips with the obvious fact that proper long-term solutions to the technical problems of aviation development can be achieved only within the framework of a new, adequately empowered governmental organization.

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B. LEGISLATION NEEDED NOW

It is unfortunate that positive action for creating a central aviation authority is only now being undertaken. The period of grace, the time for relaxed planning and reorganization, has long since run out. In June of 1956, with the collision of two heavily laden airliners over the Grand Canyon, followed more recently by midair collisions involving military jets and civilian aircraft over Las Vegas, Nev., and Brunswick, Md., we began to reap the dire fruits of delay in providing the essentials of proper airways management. And to judge from a late bulletin from the Civil Aeronautics Board, indicating that there were a total of 971 reported near misses aloft during 1957, we should be thankful indeed that the harvest has not been greater.

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It was for this reason that your committee, in recommending the airways-modernization bill of last year, inserted a provision calling for the submission by January of 1959 of draft legislation to implement the Curtis proposal for a Federal aviation agency instead of deferring action for an additional 2 years as originally provided in the draft of that bill submitted by the administration. Now, however, all are convinced that the need for action is too urgent to admit of any further delay. This opinion was emphatically echoed by all who testified at the hearings on the present measure.

C. COMMITTEE ACTION ON S. 3880

The present legislation was introduced on May 21 by Senator Monroney, chairman of the Aviation Subcommittee, and has bipartisan cosponsorship by 33 other Members of the Senate. A companion measure has also been introduced in the House of Representatives by Congressman Oren Harris, chairman of the Committee on Interstate and Foreign Commerce.

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A discussion of the more significant executive recommendations adopted in the committee amendment being reported is given below. Also included as an appendix to this report is the text of the President's message of June 13.

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V. DISCUSSION OF PRINCIPAL PROVISIONS

The present legislation attempts to correct two fundamental deficiencies which now exist in the exercise of our Federal Government's responsibility for aviation matters. Discussed in a previous section, these two shortcomings may be stated as follows:

(1) Diffusion of authority for the general regulation of civil aeronautics together with a subordination of aviation interests within the Government; and

(2) Lack of clear statutory authority for centralized airspace management and essentially related activities.

The way in which S. 3880 meets each of these problems will be discussed in turn, followed by a review of the bill's provision for military participation.

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B. CENTRALIZED AIRSPACE MANAGEMENT

As indicated in a preceding section of this report, the most urgent need in aviation today is for the prompt development and institution of a system of air-traffic control which will insure the utmost degree of safety for all airspace users, civil and military alike. Your committee has suggested that part of the reason why such a system is not yet operating is because responsibility for its planning has until quite recently been scattered among a plethora of interagency committees and boards instead of being concentrated in one overall authority. But it should also be stated that this situation has been made almost inevitable

by the lack of any clear provision in present law for unified control of our national airspace.

*A diminishing resource*

The question of airspace management, which includes within it the twin problems of air-traffic control and air-navigation-facilities development, was hardly conceived at the time our present basic aviation statutes, the Civil Aeronautics Act of 1938 and the Air Commerce Act of 1926, were enacted.

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The problem presented by this recent overcrowding of the airspace is difficult if not impossible of adequate solution within the framework of present aviation statutes. The principal statutory grant of authority for airspace assignment is contained in section 4 of the Air Commerce Act of 1926 which gives the President power to establish airspace reservations within which flight may be prohibited or restricted. No comparable grant has ever been made to the Civil Aeronautics Board, although section 601 (a) (7) of the Civil Aeronautics Act does permit that body to issue air traffic rules. However, even in this respect the Supreme Court, in *United States v. Causby* (328 U.S. 256, 258), interpreting *Cameron v. Civil Aeronautics Board* (140 F. 2d 482), raised the question whether such rules are binding upon military aircraft in all cases. Furthermore, until the passage last year of the Airways Modernization Act the law was completely silent on the question of unified development of air navigation facilities.

Until quite recently, all matters involving the use of airspace were referred to the Airspace Panel of the inter-agency Air Coordinating Committee, a group first set up by Executive order in 1946, with representatives of the Army, Navy, Air Force, Post Office, Treasury, and Commerce Departments, as well as from the Civil Aeronautics Board and the Federal Communications Commission—all

agencies with any interest whatever in airspace utilization. It should be unnecessary to note that all the evils inherent in a system of interagency coordination mentioned in section II of this report were present in full force in the Air Coordinating Committee. Perhaps the best comment on the deficiencies of airspace management by this group was contained in a draft release issued by the Civil Aeronautics Board in July of 1957 proposing the establishment of new airspace allocation procedures:

Growing conflicts between the establishment of airways and actual or contemplated military training and practice areas have made designation of airspace time-consuming and contentious . . . it is now apparent that it (the ACC) cannot cope with the complex problem of diminishing airspace on the one hand and increased need for airspace on the other. Compromises resulting from the need to obtain unanimous agreement have not always been in the public interest.

Now, after long and arduous negotiation with military authorities, the Civil Aeronautics Board has recently issued a rule delegating to the Civil Aeronautics Administrator control over airspace allocation, and tightening up the military exception clause in the air traffic rules. The Board is to be complimented for its apparent success in asserting something like unified control in these matters. However, it must be recognized that this action rests for the most part upon the shifting sands of legal ambiguity.

#### *Plenary airspace control*

The present legislation proposes to clear away this ambiguity once and for all by vesting unquestionable authority for all aspects of airspace management in the Administrator of the new Agency. The "heart" of the proposed Federal Aviation Act is contained in section 307 (a)

• • • • •

The Administrator is also given plenary authority in the matter of air traffic rules, as well as for the development and operation of air navigation facilities. The functions of the Airways Modernization Board would be transferred to the new Agency. Section 4 of the Air Commerce Act would be repealed.

Your committee believes that these provisions are of the utmost significance in making possible a truly safe and effective airspace regime.

*Independent decision making*

The splintering of airspace management in the past through committee and panel negotiation has already been discussed. It is one of the evils which this bill is designed to eliminate. As indicated above, it is for this reason that the bill proposes to vest in a single Administrator plenary authority for airspace management. If such authority is once again fractionalized and made subject to committee or panel decision, the evil will only be continued.

• • • • •

It is fully expected, of course, that the Administrator will consult with other Government agencies in aviation matters which are of common concern. He will be available for service as an aviation expert where joint action or consultation with other interested departments or agencies of the Government is called for. Moreover, in areas in which he has been authorized to act with special authority, he will naturally confer with his own staff of experts, including military personnel assigned to the Agency. In this latter regard, the final action of the Administrator is expected to be both informed and considerate of the national interest. This section, therefore, is designed not to encourage arbitrary action but rather to prevent the abdication or the frustration of the special power which the Congress proposes to entrust to an informal Administrator.

*Airport site control*

Effective airspace management and planning is not a matter involving airborne craft alone. As a natural corollary it also involves the location of new airports, missile sites, etc., whose landing patterns or other airspace requirements may conflict with the present usage of airspace. \* \* \*

Thus, section 308 provides, in substance, that no Federal funds shall be expended for the construction or substantial alteration of civil or military airports, missile sites, etc., until the location, plans, and layouts thereof have been approved by the Administrator. Civil airports receiving Federal funds, have been under such restriction since 1938, the date of the enactment of the existing Civil Aeronautics Act. The bill, therefore, merely extends to military airports the identical review of airport locations which has been uniformly practiced with reference to nonmilitary airports for two decades. With respect to civil airport construction which does not involve the expenditure of Federal funds, the bill would require that reasonable notice be given to the Administrator so that he might advise as to the effects of such construction upon properly planned airspace allocations and air navigation patterns.

\* \* \*

The need for the Administrator's authority in this area is obvious. The responsibility for effective planning for airspace allocation and air traffic safety would be negated by preventing the Administrator from exercising an effective reviewing function over the location of airports. A scrambled situation could develop in the pattern of civil and military airports and related facilities without the necessary coordination which the bill proposes to entrust to the Administrator. Air safety is already threatened in some areas of the United States through unwise locations of civil and military airports and unless authority is centralized this situation could undermine the principal purpose of this bill.

\* \* \*

Substantive changes made by your committee in the bill as originally introduced were principally those recommended by the executive branch in the proposals submitted during the course of committee hearings. These proposals are summarized in the President's message which is reprinted as an appendix to this report. The bill as reported differs from the executive proposals in only two important respects. As previously mentioned, the bill provides for a measure of positive control by the Administrator over the location of future military airfields and missile sites. Second, the bill retains primary responsibility for the conduct of accident investigations in the Civil Aeronautics Board, whereas the executive agencies recommended that the Administrator be responsible for the field work phase of investigations.

• • • • •

#### APPENDIX A

THE WHITE HOUSE.

*To the Congress of the United States:*

Recent midair collisions of aircraft, occasioning tragic losses of human life, have emphasized the need for a system of air traffic management which will prevent, within the limits of human ingenuity, a recurrence of such accidents.

In this message, accordingly, I am recommending to the Congress the establishment of an aviation organization in which would be consolidated among other things all the essential management functions necessary to support the common needs of our civil and military aviation.

• • • • •

A fully adequate and lasting solution to the Nation's air traffic management problems will require a unified approach to the control of aircraft in flight and the utilization of airspace. • • •

The concept of a unified Federal Aviation Agency charged with aviation facilities and air traffic management

functions now scattered throughout the Government has won widespread support in the Congress and among private groups concerned with aviation.

• • • • •

In accordance with this congressional directive, it had been my intention to submit recommendations for a Federal Aviation Agency to the Congress early in the next session. The recent Maryland collision has made it apparent, however, that the need for action is so urgent that the consolidation should be undertaken now.

I therefore recommend that the Congress enact at the earliest practicable date legislation establishing a Federal Aviation Agency in the executive branch of the Government and that the new Agency be given the powers required for the effective performance of the responsibilities to be assigned to it.

• • • • •

I recommend that the Federal Aviation Agency be given full and paramount authority over the use by aircraft of airspace over the United States and its territories except in circumstances of military emergency or urgent military necessity.

To assure maximum conformance with the plans, policies and allocations of the Administrator with respect to airspace, I recommend that the legislation prohibit the construction or substantial alteration of any airport or missile site until prior notice has been given to the Administrator and he is afforded a reasonable time to advise as to the effect of such construction on the use of airspace by aircraft.

• • • • •

DWIGHT D. EISENHOWER.

THE WHITE HOUSE, *June 13, 1958.*

• • • • •  
APPENDIX B

The following documents were prepared by the committee staff for the use of the committee, and are reproduced here for the convenience of the Members of the Senate.

COMPARISON OF PRESIDENTIAL RECOMMENDATIONS AND  
PROVISIONS OF COMMITTEE AMENDMENT

1. *Creation of Federal Aviation Agency*

"I therefore recommend that the Congress enact at the earliest practicable date legislation establishing a Federal Aviation Agency in the executive branch of the Government and that the new Agency be given the powers required for the effective performance of the responsibilities to be assigned to it."

Corresponds to original proposal in S. 3880, retained in committee amendment.

• • • • •  
12. *Paramount authority over use of airspace*

"I recommend that the Federal Aviation Agency be given full and paramount authority over the use by aircraft of airspace over the United States and its territories except in circumstances of military emergency or urgent military necessity."

Provided for in original S.3880 and retained in committee amendment. Provision for deviation from air traffic rules in the event of military emergency included, as recommended by the President, giving statutory sanction to present provisions of CAB rules.

13. *Location of airports*

"To assure maximum conformance with the plans, policies and allocations of the Administrator with respect to airspace, I recommend that the legislation prohibit the

construction or substantial alteration of any airport or missile site until prior notice has been given to the Administrator and he is afforded a reasonable time to advise as to the effect of such construction on the use of airspace by aircraft."

Involves change in the original provisions of S. 3880. Provisions of S. 3880 as to military airports are retained, with some modification and clarification, by the committee amendment and specific language recommended by the President rejected. Provision for notice adopted by committee amendment with respect to private airports in enforcing expenditure of Federal funds in lieu of original provision of S. 3880 on this subject.

PROPOSED COMMITTEE AMENDMENT TO S. 3880

• • • • •

A title-by-title summary of the salient provisions is as follows:

*Title I. General provisions*

No substantial change in existing law. Declaration of congressional policy is divided into two sections to govern both the Board and the new agency. Certain definitions have been modernized as contained in original bill and also as recommended by the Administration.

• • • • •

*Title III. Organization of Agency and powers and duties of Administrator*

Creates new Federal Aviation Agency to be headed by civilian Administrator, assisted by a Deputy Administrator who may be a member of the Armed Forces; provides for participation by military personnel in certain policymaking functions by direct assignment to the agency under agreements with the Department of Defense.

• • • • •

P.A. 59

Gives Administrator authority for civil and military use of airspace, operations of air navigation facilities, promulgation of air traffic rules, expenditure of Federal funds for civil and military airports and research and development in air traffic control and navigation.

*Title XI. Miscellaneous*

Reenacts present law without significant change.

---

**House of Representatives Report No. 2360  
August 2, 1958**

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 3880), to create a Civil Aeronautics Board and a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

**PURPOSE OF LEGISLATION**

The principal purpose of this legislation is to establish a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations.

Therefore, it proposes to establish a separate Federal Aviation Agency with the powers described below. The new Agency would replace the present Civil Aeronautics Administration.

The Administrator of the new Federal Aviation Agency (1) would be given full responsibility and authority for the

advancement and promotion of civil aeronautics generally, including the promulgation and enforcement of safety regulations, and (2) would be charged with the management of the national airspace, including responsibility for establishing and enforcing air traffic rules and for the development and operation of air-navigation facilities. Appropriate military participation in the Agency is provided.

• • • • •

The new Federal Aviation Agency would be headed by a civilian Administrator with plenary authority to—

- (a) Allocate airspace and control its use by both civil and military aircraft;
- (b) Make and enforce air traffic rules for both civil and military aircraft;
- (c) Develop and operate a common system of air navigation facilities for both civil and military aircraft;
- (d) Make and enforce safety regulations governing the design and operation of civil aircraft.

#### BACKGROUND OF LEGISLATION

This is not hastily conceived legislation. Airspace use and airsafety problems have been under consideration for a long time by this committee and the Senate Committee on Interstate and Foreign Commerce.

The magnitude and critical nature of the problem came first to general public notice, perhaps, as a result of the midair collision of two airliners over Grand Canyon on June 30, 1956, when 128 lives were lost. Following this disaster were fatal air crashes between civil and military aircraft operating under separate flight rules established in the Civil Air Regulations.

• • • • •

### DIVISION OF RESPONSIBILITY

Divided authority over airspace use forced the executive branch to resort to the committee method to solve, or attempt to solve, conflicts over airspace allocations. In 1946, Executive Order 9781 created the Air Coordinating Committee. This Committee, which can act only by unanimous consent, come to play an important role in airspace control, and diluted further the role of the Civil Aeronautics Administration and the Civil Aeronautics Board.

Under this system, airspace has been assigned on a case-by-case basis often resulting in delays and patchwork solutions to many critical airspace problems. For example, this Committee, in its investigation of the Grand Canyon accident, found that establishment of an airway over the heavily traveled route over Grand Canyon was being delayed by objections of the military made through an Air Coordinating Committee panel.

Clearly an agency is needed now to develop a sound national policy regarding use of navigable airspace by all users—civil and military. This agency must combine under one independent administrative head functions in that field now exercised by the President, the Department of Defense, the Department of Commerce, and the Civil Aeronautics Board.

It is also intended by this bill to eliminate divided responsibility and conflicts of interest that exist in other areas, particularly conflicts between civil and military agencies in the field of electronic aids to air navigation.

\* \* \* \* \*

### NEED FOR LEGISLATION

Feeling the need for immediate action following the recent tragic air accidents, the chairman of this committee and Senator Monroney, chairman of the Subcommittee on Aviation of the Senate Committee on Interstate and For-

eign Commerce, introduced identical bills, H.R. 12616 and S. 3880 in the House and Senate, respectively, proposing a far-reaching reorganization of Federal airspace control activities.

• • • • •  
As introduced, H. R. 12616 proposed to:

1. Create a Federal Aviation Agency, an independent agency, directly responsible to the President and the Congress, headed by a single civilian administrator with prior aviation experience.

2. Give the Administrator authority to regulate the use of all airspace over the United States by both civil and military aircraft, and to establish and operate a unified system of air-traffic control.

• • • • •  
5. Transfer to the new Agency the present responsibility of the Civil Aeronautics Board for making and enforcing air safety rules, with provision for appeal to the Board from orders of the Administrator in certain instances.

• • • • •  
SAFETY RULEMAKING AUTHORITY

• • • • •  
How to insure the maximum possible safety and efficiency under proper regulations, impartially enforced, is one of the major problems in connection with this legislation.

It is a problem that has received the most careful consideration of this committee.

In giving consideration to these problems, the committee received views and suggestions from various segments of civil aviation, and from representatives of Government agencies concerned with both civil and military aviation.

Agreement was expressed regarding the need for a new agency to develop and operate a single system of air traffic

control for joint use civil and military aviation—a so-called common system. There was disagreement, however, over how much safety rulemaking authority should be given this new agency.

Representatives speaking for the executive branch recommended that the new agency be given full safety rulemaking authority without review by the Civil Aeronautics Board, to avoid duplication of effort and a division of authority that could result in further confusion over responsibility.

This position also was supported by the Air Transport Association and the General Aviation Facilities Planning Group, representing all civil flying other than the scheduled airlines and the large irregular carriers.

It is the intent of the legislation that the Administrator shall discharge his rulemaking powers in a fair and impartial manner to promote the public interest and to provide for the national defense. It is intended that these powers shall be exercised in accordance with constitutional and statutory safeguards applicable to other agencies of the Government that have been granted similar rulemaking authority by the Congress.

• • • • •

#### MILITARY PARTICIPATION IN NEW AGENCY

The question of the extent and nature of military participation in the new agency was perhaps the most difficult one faced by the committee. Integration of Department of Defense activities in the field of air traffic control into the new agency is important in the interest not only of the efficient use of air space, with its important national defense connotations, but is urgently needed for reasons of governmental economy.

• • • • •

MILITARY AIRPORTS

The section dealing with military airports and missile bases is of vital importance.

The implications of the section are more far reaching than might be apparent. The location and runway layout of an airport may seriously affect the use of the navigable airspace over a wide area. To give the Administrator authority to place restrictions on civil airports but leave him without any voice in the location or runway layout of a military airport or a missile site would deprive him of the authority he must have to carry out the intent of this legislation. To give the Administrator authority over the deployment of military air units would be going too far, however, and is not contemplated. Potential conflict in site location is the problem which this legislation attempts to meet.

Certainly the Administrator should have advance notice of any construction or airport alteration which might interfere with the use of navigable airspace. This will give him an opportunity to consult with appropriate agencies of the Department of Defense and to offer advice and suggestions regarding the elimination of any airspace-use problems presented. The Administrator is also required to advise with appropriate committees of the Congress where an airspace conflict may develop. Such action would give ample notice to the appropriate committees of the Congress which have responsibilities regarding recommendations as to policies and the appropriation of public funds.

In case of a disagreement between the Administrator and the Department of Defense, after due consideration of the points at issue, the disagreement can be taken to the President for his determination.

Clearly, if the arrangement provided in section 308(b) is to accomplish the purpose intended, the Military Estab-

lishment should not proceed with construction until the Administrator has been consulted and has had an opportunity to give the problem due consideration. In case of a disagreement, construction must be held in abeyance until the disagreement has been resolved by a recommendation by the President. Any other course would negate section 308 (b) and circumvent the clear intent of this legislation.

#### EFFECT OF REPEALS AND REENACTMENT

In proposing this legislation it is not the intention of the committee to either adopt or reject administrative interpretations or practices, or judicial decisions under the present law. The reenactment of provisions which are now in effect should be considered as an absolute neutral factor in any question of interpretation which may arise in the future.

From the standpoint of the continuity of the provisions of law involved in this legislation, insofar as they are not changed from the provisions of law being repealed, it is intended that the reenactment of such provisions shall be considered to have the same effect as though the new act were amending the Civil Aeronautics Act of 1938 to "read as follows."

#### TITLE-BY-TITLE SUMMARY OF THE COMMITTEE AMENDMENT

The following is a title-by-title summary of the substitute amendment reported by the committee, with particular reference to how it differs in substance from the provisions of existing law which this legislation proposes to repeal and reenact. Unless otherwise indicated, existing law referred to is the Civil Aeronautics Act of 1938, as that act has been modified by amendments and by presidential reorganization plans.

In the interest of brevity, no mention is made of substantive changes of a minor and noncontroversial nature

made by the committee amendment, or of technical and clarifying modifications. The technical modifications referred to include, among other things, the elimination of provisions which have become obsolete since 1938 or changes to bring about technical conformity with other provisions of law which have been enacted by Congress.

#### TITLE I. GENERAL PROVISIONS

The definition of the term "civil airway" in present law has been omitted and a definition of the term "Federal airway" has been added. It provides that the term shall mean a portion of the navigable airspace of the United States designated by the Administrator as a Federal airway. The term "Federal airway" has been substituted for the term "civil airway" in appropriate places throughout the committee substitute.

The definition of the term "navigable airspace" has been amended to include airspace needed to insure safety in takeoff and landing of aircraft.

A new and separate declaration of congressional policy has been specifically directed to the Administrator of the Federal Aviation Agency in order to indicate the general policy of the Congress with respect to the performance of the powers and duties vested in him.

#### TITLE III. ORGANIZATION OF FEDERAL AVIATION AGENCY AND POWERS AND DUTIES OF ADMINISTRATOR

*Organization, administrative powers, etc.*

This title, which is almost entirely new, provides for the establishment of a new Federal Aviation Agency (hereinafter called the "Agency") under the direction of an Administrator and a Deputy Administrator, both of whom

are to be appointed by the President, by and with the advice and consent of the Senate. In order to assure, to the maximum extent possible, the independence of the Administrator in the discharge of his responsibilities under the bill, this title provides that he shall not submit his decisions for the approval, nor be bound by the decisions or recommendations, of any organization created by Executive order.

The compensation of the Administrator is fixed at the rate of \$22,500 per annum and, with respect to his qualifications, this title provides that he—

- (1) shall be a citizen of the United States;
- (2) shall, at the time of his nomination, be a civilian;
- (3) shall have had experience in a field directly related to aviation;
- (4) shall not have a pecuniary interest in, or own any stocks or bonds of, any aeronautical enterprise;
- (5) shall not engage in any other business, vocation, or employment; and
- (6) shall be appointed with due regard for his fitness to discharge the powers and duties vested in him.

• • • • •  
It is provided that the Deputy Administrator shall perform such duties and exercise such powers as the Administrator may prescribe, and shall act as Administrator during the absence or disability of the Administrator.

The provisions with respect to the qualifications and status of the Deputy Administrator are identical with those prescribed for the Administrator, except that the Deputy Administrator may be an officer on active duty with the Armed Forces of the United States. • • •

• • • • •

This title also provides for direct participation by military personnel in the exercise of the functions of the Administrator relating to the regulation and protection of air traffic (including provision of air navigation facilities and research and development with respect thereto) and the allocation of airspace. \* \* \*

• • • • •

#### *General powers*

Under this title, the Administrator is required to prescribe air-traffic rules and regulations governing the flight of aircraft, a duty which the Civil Aeronautics Board is empowered to perform under existing law. This important change places the responsibility for the safe and efficient use of the navigable airspace of the United States by both civil and military aircraft primarily in the hands of the Administrator. It is also his responsibility under this title to acquire, establish, operate, and improve air-navigation facilities, to conduct related research and development activities, and to provide necessary facilities and personnel for the regulation of air traffic.

In addition, it is provided that no Federal funds shall be expended (other than for military purposes) for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area (including air-navigation facilities thereon) unless the Administrator certifies that such landing area (or air-navigation facility) is reasonably necessary for use in air commerce or in the interests of national defense. It is further provided that no military airport or landing area, or missile or rocket site, shall be acquired, established, or constructed, or any runway layout substantially altered, unless reasonable prior notice thereof is given to the Administrator so that he may advise with the Congress, and with other interested agencies, with respect to the effect of any such proposed action on the use of airspace by aircraft. In the case of

P.A. 69

any other airport, it is also provided that reasonable prior notice be given to the Administrator so that he may advise as to the effect on the use of airspace by aircraft. \* \* \*

TITLE XI. MISCELLANEOUS

This title contains provisions dealing with hazards to air commerce, the effect of international agreements on the exercise of powers and duties vested in the Board and the Administrator, the nature and use of documents filed with the Board, public use of air navigation facilities owned or operated by the United States, the navigation of foreign aircraft in the United States, and the application of certain laws relating to foreign commerce.

APPENDIX

AGENCY REPORTS

The committee received and considered the following letters in connection with this legislation:

EXECUTIVE OFFICE OF THE PRESIDENT,

BUREAU OF THE BUDGET  
Washington, D. C. July 28, 1958.

HON. OREN HARRIS,

*Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D. C.*

MY DEAR MR. CHAIRMAN: This will acknowledge your letter of July 17, 1958, inviting the Bureau of the Budget to comment on S. 3880, a bill to create a Civil Aeronautics Board and a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft.

P.A. 70

The bill substantially conforms with recommendations of the President contained in his message transmitted to the Congress on June 13, 1958. These recommendations were incorporated in H. R. 12616 and proposed amendments thereto presented to your committee on behalf of the administration by the Chairman of the Airways Modernization Board.

You are therefore advised that the enactment of S. 3880 would be in accord with the program of the President.

Sincerely yours,

PHILLIP S. HUGHES,  
*Assistant Director for Legislative Reference.*

• • • • •  
DEPARTMENT OF THE AIR FORCE,  
OFFICE OF THE SECRETARY,  
Washington, D. C., July 23, 1958.

HON. OREN HARRIS,

*Chairman, Interstate and Foreign Commerce Committee,  
House of Representatives.*

DEAR MR. CHAIRMAN: I refer to your request for the comments of the Department of Defense on S. 3880, an act to create a Civil Aeronautics Board and a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, which was referred to your committee on July 15, 1958. The Secretary of Defense has delegated to this Department the responsibility for expressing the views of the Department of Defense on this matter.

• • • • •  
This Department feels it is of great importance that this proposed legislation establishing a Federal Aviation Agency be enacted during this session of Congress. It is urgent that the Congress set up at the earliest date a single

P.A. 71

agency with the broad authority to support common needs of civil and military aviation in the United States and to provide for the safe and efficient use of the airspace, taking into full account both the military requirements for national defense and the needs of civil aviation. S. 3880, as referred to your committee, effectively accomplishes these objectives.

S. 3880 represents, in the opinion of the Department of Defense, an excellent balancing of the civil and military interests involved in national aviation, with the objective of achieving effective joint planning and greater safety and efficiency in the use of the airspace. \* \* \*

\* \* \* \* \*

MALCOLM A. MACINTYRE,  
*Under Secretary.*

\* \* \* \* \*

CIVIL AERONAUTICS BOARD,  
*Washington, July 29, 1958.*

HON. OREN HARRIS,

*Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D. C.*

DEAR CONGRESSMAN HARRIS: The Board is in receipt of your letter of July 17, 1958, requesting our views in connection with S. 3880, as passed by the Senate, a bill to create a new Federal Aviation Agency.

\* \* \* \* \*

It is difficult to believe that Congress would be willing to transfer to the executive branch the quasi-legislative rule-making function which it has seen fit to vest in the Civil Aeronautics Board without providing for reasonable safeguards. The Congress, and particularly your committee, has shown deep concern over the question of whether the regulatory agencies are exercising their quasi-legislative

and quasi-judicial functions independently of the executive branch. In our testimony before your committee, we pointed out that the firm stand which you and your colleagues have taken was of considerable assistance to the Board in enabling it to assert its legislative authority in the field of safety rulemaking, particularly with respect to the recent airspace regulation. S. 3880 would turn over to the executive branch not only the entire control of airspace, the very matter which the Board, after difficult and painstaking consultations with the military, was able to free from executive control, but all of the safety rulemaking as well.

• • • • •

One of the most troublesome aspects of S. 3880, and one which could have a serious impact on the local service and smaller trunkline carriers, is the failure of the proposed bill to give any consideration to balancing the equities between economic and safety considerations insofar as safety rulemaking is concerned. S. 3880 completely ignores this basic concept which is one of the underlying philosophies of the Civil Aeronautics Act. Under the proposed bill the Administrator would issue safety regulations but would not be competent, nor would he be expected, to weigh the economic aspects. • • •

• • • • •

The Board is strongly of the view that the military should have no direct responsibility in the field of safety rulemaking. There is a place for the participation by the military in the regulatory process but not in the making of a final independent decision. The Defense Establishment is the largest and one of the most important users of the airspace. S. 3880 ignores the fact that there are other important users such as the certificated air carriers, the supplemental carriers, general aviation, and the private flyer who are also vitally concerned with the allocation of airspace. At the present time all of the users of the air-

P.A. 73

space have an equal opportunity to participate in rule-making proceedings, with the final decision resting in the Civil Aeronautics Board. It is the Board's view that the final decision should be made by a truly independent quasi-legislative agency of the Congress and that this function should not be shared by any party in interest.

• • • • •

Sincerely yours,

JAMES R. DUFFEE,  
*Chairman.*

## **JOINT APPENDIX**

# J.A. (i)

## JOINT APPENDIX

### TABLE OF CONTENTS

	Page
FAA's "Cooperative Survey of Airport Information on Facilities and Services" with respect to Freeway Airport, dated June 30, 1961 .....	J.A. 1
Pepco's "Notice of Proposed Construction or Alteration", dated Dec. 26, 1961 .....	J.A. 2
Memorandum, dated Jan. 10, 1962, from Chief, Airport's Branch, FAA, to Chief, Air Traffic Division, FAA .....	J.A. 3
FAA letter to Pepco, dated Feb. 16, 1962, advising as to preliminary determination of hazard to air navigation .....	J.A. 4
Pepco letter to FAA, dated Mar. 5, 1962, requesting aeronautical study .....	J.A. 6
FAA memorandum, dated Mar. 14, 1962, circularizing Pepco proposal for comment .....	J.A. 7
Plat of Freeway Airport, showing Pepco's proposed power lines .....	J.A. 9
Miscellaneous memoranda and letters to FAA commenting on Pepco's proposal .....	J.A. 10-13
FAA letter, dated April 26, 1962, distributing agenda for May 15, 1962 FAA Airspace Meeting .....	J.A. 14
Agenda Item No. 10 for May 15, 1962 FAA Airspace Meeting .....	J.A. 15
FAA memorandum, dated June 8, 1962, as to Agenda Item No. 10 at May 15, 1962 FAA Airspace Meeting .....	J.A. 16
Determination of Hazard to Air Navigation, issued October 19, 1962 .....	J.A. 17
Pepco Petition for Public Hearing, dated Nov. 16, 1962 .....	J.A. 19
Rodenhauser Answer to Pepco Petition for Public Hearing .....	J.A. 24
FAA letter to Pepco, dated Feb. 1, 1963, denying Petition for Public Hearing .....	J.A. 26
Petition for Review by Court of Appeals .....	J.A. 27
Stipulation of issues before Court of Appeals .....	J.A. 32
Prehearing Order .....	J.A. 34
Rodenhauser Petition for Leave to Intervene .....	J.A. 35
Order granting leave to intervene .....	J.A. 37

J.A. 1

**FAA's "Cooperative Survey of Airport Information on Facilities  
and Services" With Respect to Freeway Airport,  
Dated June 30, 1961**

COOPERATIVE SURVEY OF AIRPORT INFORMATION ON FACILITIES AND SERVICES				Form Approved Dulles Survey No. 41-81577-1
CITY OR TOWN <b>Mitchellville</b>		85	COUNTY <b>Prince George</b>	STATE <b>Maryland</b>
AIRPORT NAME <b>Freeway</b>		NAME OF AERONAUTICAL SECTIONAL CHART ON WHICH AIRPORT WOULD BE SHOWN <b>Washington</b>		
GEOGRAPHIC POSITION LATITUDE <b>38° 56'</b>		LONGITUDE <b>76° 46'</b>	ELEVATION <b>160'</b>	
IDENTIFYING LANDMARKS		DERIVATIVE LOCATION <b>S</b> STATUTE MILES <b>5</b> FROM <b>DOVILLE</b> (Direction) (City or Town)		
		IS AIRPORT ATTENDED ON REGULAR SCHEDULE <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO If "Yes" indicate schedule: MONTH: DAYS: HOURS: <b>24</b>		
		IS AIRPORT OPEN TO THE GENERAL PUBLIC <input checked="" type="checkbox"/> YES <input type="checkbox"/> ANYTIME <input type="checkbox"/> EMERGENCY NO <input type="checkbox"/> HOURS ONLY <input type="checkbox"/> OTHER		
		NO. AIRPORT HAS CIVIL AIRCRAFT SINGLE ENGINE <b>9</b> MULTI-ENGINE <b>0</b> TOTAL <b>9</b>		
R/WAY INSET	R/WAY LENGTH	R/WAY WIDTH	TYPE SURFACE	
<b>R/S</b>	<b>3400'</b>	<b>100'</b>	<b>Sod</b>	
<b>RW/SE</b>	<b>2000'</b>	<b>85'</b>	<b>Sod</b>	
<b>RW/SW</b>	<b>1800'</b>	<b>100'</b>	<b>Sod</b>	
OBSTRUCTIONS (Buildings, Trees, Poles, Lines, etc.) <b>None</b>				
LIGHTING <b>NONE</b>				
<input type="checkbox"/> ROTATING BEACON	COLOR	OPERATING SCHEDULE		
<input type="checkbox"/> BOUNDARY		PRINCIPAL FACILITIES ELEV. CAP. IN 30,000' BY 2500'		
<input type="checkbox"/> OBSTRUCTION		IS HANGAR SPACE AVAILABLE <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
<input type="checkbox"/> FLOOD		OPERATING AIRCRAFT <input type="checkbox"/> MAJOR <input checked="" type="checkbox"/> MINOR ENGINE <input type="checkbox"/> MAJOR <input checked="" type="checkbox"/> MINOR		
<input type="checkbox"/> HURRAY <input type="checkbox"/> HI <input type="checkbox"/> NC <input type="checkbox"/> LO		FLIGHT DATA FILE TYPE <input type="checkbox"/> STATION <input type="checkbox"/> PHONE <b>NONE</b> <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
THRESHOLD		MINI LIGHT SYSTEM INDICATOR <input checked="" type="checkbox"/> YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
PARAPET		IS AIRPORT LICENSED BY THE STATE <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO If "Yes" check classification assigned <input type="checkbox"/> MUNICIPAL <input checked="" type="checkbox"/> COMMERCIAL <input type="checkbox"/> PRIVATE <input type="checkbox"/> PERSONAL USE		
APPROACH		DO YOU WANT THIS AIRPORT SHOWN ON AERONAUTICAL CHARTS <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		
Your Name and Title <b>Owner</b> <b>Dwain Rodenbauer</b>		Mailing Address <b>RT 1- Box 163</b> <b>Mitchellville Md</b>		Date <b>6/30/61</b>

Form FAA-29A-1 (10-57)

J.A. 2

**PEPCO's "Notice of Proposed Construction or Alteration."**  
**Dated December 26, 1961**

*Form approved by Bureau of Budget No. 04-7061.7*

<b>FEDERAL AVIATION AGENCY</b>  <b>NOTICE OF</b> <b>PROPOSED CONSTRUCTION OR ALTERATION</b>  <b>PART 426, REGULATIONS OF THE ADMINISTRATOR</b>	<small>NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., PROPOSING CONSTRUCTION OR ALTERATION DESCRIBED BELOW</small> <b>Potomac Electric Power Company</b> <small>ADDRESS (Number, Street, City, Zone, State)</small> <b>929 E Street, N. W.</b> <b>Washington 4, D. C.</b>
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**A. TYPE OF STRUCTURE**

**1. CHECK APPLICABLE ITEM**

☒ **NEW CONSTRUCTION**      ☐ **ALTERATION (Change in height only)**      ☒ **PERMANENT**      ☐ **TEMPORARY**

**2. NATURE AND COMPLETE DESCRIPTION**

The construction proposed at this location is two double circuit 230,000 volt transmission lines supported on steel towers. Tower heights approximate 125 feet above ground surface and spans between towers average about 800 feet. The towers and transmission circuits will be located upon a 250 foot right of way strip purchased from the Edward S. Walker Estate. These lines, connecting a new generating site at Chalk Point to an existing substation at Burtonsville, were planned in 1957 at which time there was no indication of an airport on the Rodenhauser property.

**B. LOCATION OF STRUCTURE (Submit a map or sketch)**

1. LATITUDE	2. LONGITUDE	3. NEAREST CITY OR TOWN, AND STATE	4. RELATION TO NEAREST TOWN OR CITY
		See plat attached	DIRECTION      DISTANCE
5. NAME OF NEAREST LANDING AREA			6. RELATION TO NEAREST BOUNDARY OF LANDING AREA
			DIRECTION      DISTANCE

**7. PROVIDE THE LAND RECORDER'S MAP DESCRIPTION AND/OR LEGAL DESCRIPTION BY METES AND BOUNDS OF PROPERTY ON WHICH STRUCTURE WILL BE OR IS LOCATED (If more space is necessary, use reverse side or continue on a separate sheet of paper and attach to this notice.)**

See Exhibit 'A' attached hereto.  
 See also deed from Anne O. Walker, et al, to Potomac Electric Power Company, dated May 25, 1960, recorded on June 6, 1960 in Liber 2453, Folio 110.

8. DATE WORK WILL BE STARTED	9. DATE WORK WILL BE COMPLETED	10. OVERALL HEIGHT (IN FEET) OF COMPLETED STRUCTURE ABOVE		
November 1, 1961	First Line early in 1963.	A. GROUND LEVEL	B. MEAN WATER LEVEL (IF SO SITUATED)	C. MEAN SEA LEVEL
		125 feet, more or less		

11. CHECK WHETHER COMPLETED STRUCTURE WILL BE		YES	NO
A. MARKED FOR THE PROTECTION OF AIR NAVIGATION.....			X
B. PAINTED AS SPECIFIED IN OBSTRUCTION MARKING MANUAL.....			X
C. LIGHTED AS SPECIFIED IN OBSTRUCTION MARKING MANUAL.....			X

**C. CERTIFICATION:** I hereby certify that all of the above statements made by me are true, complete, and correct to the best of my knowledge.

DATE	SIGNATURE OF PERSON MAKING CERTIFICATION	TITLE
December 26, 1961	/s/ R. L. BORTNER R. L. Bortner	Manager, Real Estate Department.

J.A. 3

Memorandum, Dated January 10, 1962, from Chief, Airport's  
Branch, FAA, to Chief, Air Traffic Division, FAA

FEDERAL AVIATION AGENCY  
UNITED STATES GOVERNMENT

MEMORANDUM Date: Jan. 10, 1962

Subject: Proposed PEC Power Line  
Mitchellville, Maryland

From: Chief, Airports Branch

To: Chief, Air Traffic Division, EA-500

Attn.: Chief, Airspace Utilization Branch, EA-550

For your further processing, we are attaching two copies of a Notice of Construction, Form FAA-117, with accompanying property drawing and description for a proposed double circuit 230KV transmission line at the subject location.

The proposed line would run adjacent to the Freeway Airport located on the Rodenhauser property shown on the attached property drawing. We have asked the District Airport Engineer to submit a drawing of the Freeway Airport showing its relation to the proposed power line. We will forward this to you when it is received.

The Freeway Airport has not received airspace clearance in accordance with Part 625 of the Regulations of the Administrator. The District Airport Engineer transmitted Forms FAA-2681 to Mr. Irwin Rodenhauser on December 11, 1961, and requested that he complete the forms so that an airspace review could be accomplished for his airport. No reply has been received.

JOSEPH W. MOTT, JR., EA-490

Attachments.

J.A. 4

**FAA Letter to Pepco, Dated February 16, 1962, Advising as to  
Preliminary Determination of Hazard to Air Navigation**

**FEDERAL AVIATION AGENCY  
EASTERN REGION  
FEDERAL BUILDING  
NEW YORK INTERNATIONAL AIRPORT  
JAMAICA, NEW YORK**

**February 16, 1962**

**Subject: Power Line  
Mitchellville, Md.  
Case No. 1-OE-1202**

**Mr. R. L. Bortner  
Manager, Real Estate Department  
Potomac Electric Power Company  
929 E Street, N.W.  
Washington 4, D.C.**

**Dear Mr. Bortner:**

We have studied the proposal described in your Form FAA-117, dated December 26, 1961, with attachments. Structural heights exceed the criteria of hazards to air navigation in Part 626.13(a)(1) and (b)(2), Regulations of the Administrator, as applied to Freeway Airport. Consequently, a preliminary determination has been made that this construction will constitute a hazard to air navigation.

The proposed power line, if constructed alongside the boundary of the airport, will conflict with the runway approach surfaces for all four runways. The degree of criteria violation varies from approximately 63 feet to 125 feet above ground (over-all height above ground indicated on Form FAA-117). In telephone conversation, you stated it would be completely impractical to place the power line underground. As an alternative, the possibility of relocation might be considered.

J.A. 5

If you do not choose to relocate the proposed construction, you may request an aeronautical study within thirty days of the date of this letter. In the absence of such a request, the preliminary determination herein stated will become final.

Sincerely,

FRANK SCHAEFER

for CHARLES H. NEWPOL  
Chief, Airspace Utilization  
Branch

J.A. 6

**Pepco Letter to FAA, Dated March 14, 1962. Requesting  
Aeronautical Study**

POTOMAC ELECTRIC POWER COMPANY  
929 E STREET, NORTHWEST  
WASHINGTON 4, D. C.

GEORGE BISSET  
Senior Vice President

March 5, 1962.

Federal Aviation Agency,  
Eastern Region,  
Federal Building,  
New York International Airport,  
Jamaica,  
New York.

*Attention: Mr. CHARLES H. NEWPOL.*

Re: Power Line, Mitchellville, Md.,  
Case No. 1-OE-1202.

Dear Sirs:

We refer to the letter dated February 16, 1962 addressed by your Mr. Newpol to our Mr. Bortner in connection with the above matter.

Pursuant to § 626.31(a)(1) of your regulations, we hereby request an aeronautical study of the effect of our proposed structures on the use of the navigable airspace by aircraft.

Very truly yours,

POTOMAC ELECTRIC POWER COMPANY

By GEORGE BISSET  
*Senior Vice President*

CM:ICS

J.A. 7

**FAA Memorandum, Dated March 14, 1962. Circularizing  
Pepco Proposal for Comment**

**FEDERAL AVIATION AGENCY  
EASTERN REGION  
FEDERAL BUILDING  
NEW YORK INTERNATIONAL AIRPORT  
JAMAICA, NEW YORK**

March 14, 1962

**To: All Interested Parties**

**SUBJECT: Special Aeronautical Study; Case No. 1-OE-1202**

The Federal Aviation Agency has been asked to determine the effect on aeronautical activity which may be created by the following proposed construction:

**Proponent: Potomac Electric Power Company**

**Description: Electrical transmission line supported on steel towers**

**Location: Adjacent to Freeway Airport, Mitchellville, Md.**

**Latitude—38°57' N**

**Longitude—76°46' W**

**Height: Above Ground—See Attached Plan**

**Above Mean Sea Level—See Attached Plan**

**Aeronautical Chart: Freeway Airport Plan Attached.**

Your review of this proposal will be appreciated. Concurrence may be indicated by use of the endorsement below. If you wish to interpose objection to the proposal, a separate letter setting forth valid aeronautical reasons should be provided.

J.A. 8

Replies received not later than April 6, 1962 will be considered before final action is taken on this proposal. Please address reply to Chief, Airspace Utilization Branch, EA-550.

FRANK SCHAEFER

for CHARLES H. NEWPOL  
Chief, Airspace Utilization  
Branch, Air Traffic Division

Attachment

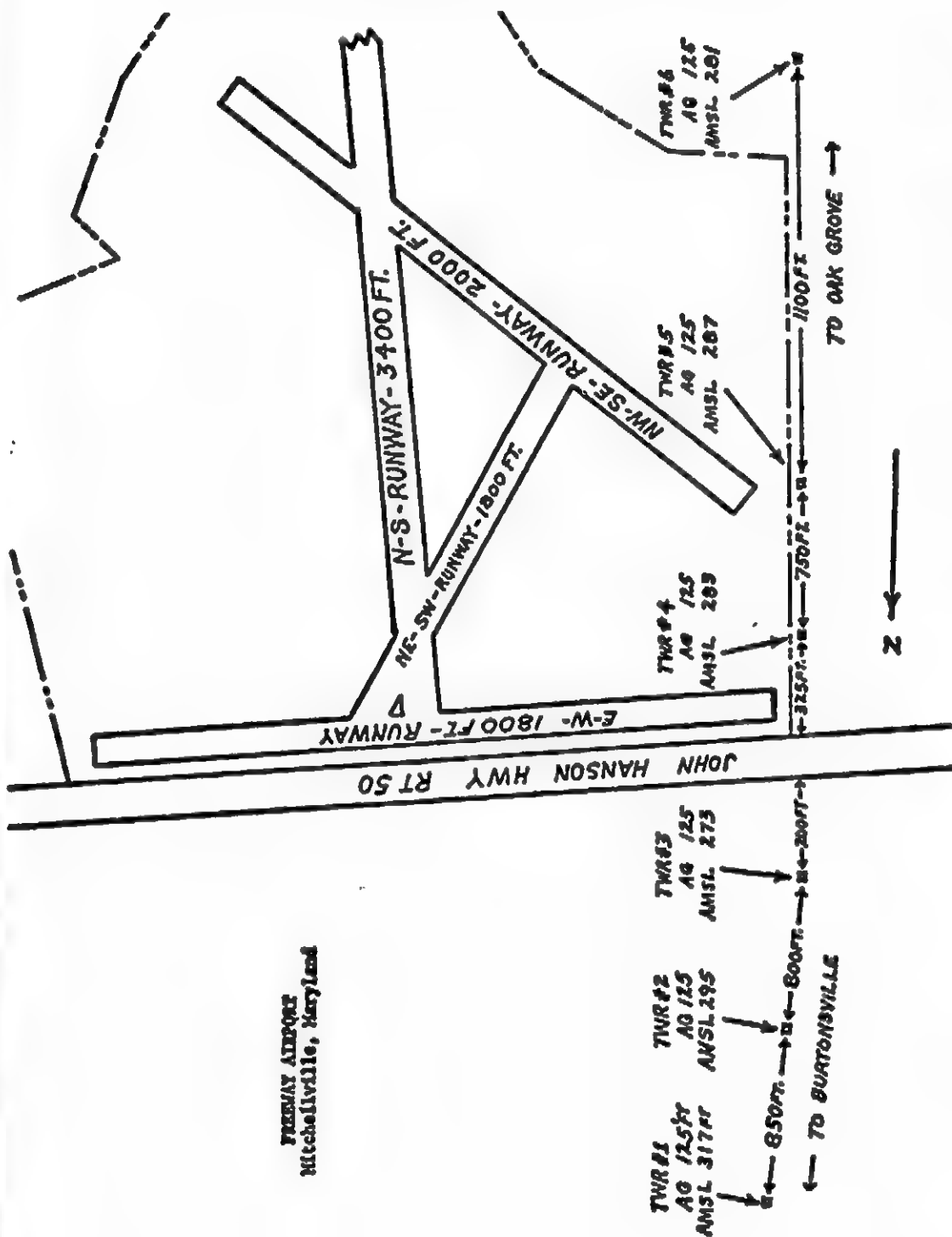
The above proposal has been reviewed and no objections are interposed.

SIGNED ..... DATE .....

REPRESENTING .....

J.A. 9

Plat of Freeway Airport, Showing Pepco's Proposed  
Power Lines



J.A. 10

**Miscellaneous Memorandum and Letters to FAA  
Commenting on Pepco's Proposal**

**AOPA**

**AIRCRAFT OWNERS AND PILOTS ASSOCIATION  
Washington 14, D. C.**

**March 26, 1962**

**Mr. Charles H. Newpol  
Chief, Airspace Utilization Branch  
Air Traffic Division  
Federal Aviation Agency  
Federal Building, N.Y. Int'l Airport  
Jamaica, New York**

**Dear Mr. Newpol:**

Reference is made to Special Aeronautical Study Case No. 1-OE-1202 which presents a proposal to construct a powerline along the west side of the Freeway Airport, Mitchellville, Maryland.

The Aircraft Owners and Pilots Association vigorously opposes the construction of a powerline in such a location as is proposed in this case. This powerline is within a few feet of the ends of two runways of the Freeway Airport. Construction of such a powerline would render these two runways unusable for landing in either direction and unusable for takeoffs to the west.

In view of the violation of Part 626 of the Administrator's Regulations, an aeronautical study is recommended.

**Cordinally,**

**R. G. ARMSTRONG  
R. G. Armstrong  
*Airspace and Liaison***

J.A. 11

FEDERAL AVIATION AGENCY  
UNITED STATES GOVERNMENT

MEMORANDUM Date: 26 March 1962

Subject: Special Aeronautical Study; Case No. 1-OE-1202  
From: U. S. Army Airspace Representative  
To: Chief, Airspace Utilization Branch, EA-550

1. The Army has no immediate interest in the Freeway Airport at Mitchellville, Maryland. However, the proposed construction would apparently present a hazard to operations, and the Army will support any objections based upon aviation safety.

ROBERT D. HYMAN  
Robert D. Hyman  
*Major, GS*  
*U. S. Army Airspace Representative*

Attachment

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NATIONAL PILOTS ASSOCIATION  
1025 CONNECTICUT AVENUE, N.W.  
WASHINGTON 6, D. C.

March 30, 1962

Chief, Airspace Utilization Branch  
Federal Aviation Agency  
New York International Airport  
Jamaica, New York

Case 1-OE-1202

Dear Sir:

With respect to Airspace Case No. 1-OE-1202 giving details of a proposed power line to be erected adjacent to the Freeway Airport at Mitchellville, Maryland, we would like to file objections from an aeronautical standpoint for the following reasons.

1. The erection of these power lines in the proposed location would cause the closing of the east-west runway,

J.A. 12

the northwest runway, the southeast runway, and possibly the southwest-northeast runway.

2. Should the above mentioned runways be allowed to remain open the glide angle over the wires will be too steep for length of the runways, thereby imposing a hazardous condition.

3. According to the wind rose of the Freeway Airport, during the months of October through April the wind is out of the northwest which means that the northwest runway is essential for the safe operation of the airport. Upon the erection of these wires, the elimination of the northwest runway would be necessitated.

4. As far as the airport appearance is concerned these lines would be a definite hindrance.

5. Freeway has been a licensed airport since May, 1959. In addition there has been an active runway (east and west) since the year 1946.

6. Due to its location Freeway may become one of the foremost general aviation airports in the metropolitan Washington area.

For these reasons we oppose the erection of the power lines in their proposed location. It would be our own wish that the power company would locate their lines in a place or in such a manner that they would not prove detrimental to the operation of the Freeway Airport.

Yours very truly,

DAVID H. SCOTT

David H. Scott

*Executive Vice President*

DHS:dg

cc: A. Bruce Boehm

George W. Brewster

Irvin R. Rodenhauer

J.A. 13

AIRSPACE DOCKET REPLY FORM  
Flight Standards Field Division No. 1  
Region One

Docket No. 1-OE-1202

Case No.

Date: April 10, 1962

To: Chief, Airspace Utilization Branch, EA-550  
From: Chief, Aircraft Management Branch  
Subject: Construction of Transmission Lines—Freeway  
Airport, Mitchelville, Md.

Date  
Rcvd.

COMMENTS:

We oppose any construction this close to the end of runways. Our investigation of the proposal has been coordinated with the airports owner and the Maryland Aviation Commission. A flight study of the area indicates the effective glide angle is too steep on approach for landing on the east-west runway and for landing on the northwest-southeast runway. Therefore, the proposed installation of these lines will cause the closing of these two runways. According to wind information, the months of October through April require operation to and from the northwest runway.

H. HELFRICH  
for E. E. BLANCHARD, EA-220

FAA NY-1106 (3/61)

J.A. 14

**FAA Letter, Dated April 26, 1962. Distributing Agenda for  
May 15, 1962 FAA Airspace Meeting**

**FEDERAL AVIATION AGENCY  
EASTERN REGION  
FEDERAL BUILDING  
NEW YORK INTERNATIONAL AIRPORT  
JAMAICA, NEW YORK**

**April 26, 1962**

**To: All Participants, FAA Airspace Meeting**

**SUBJECT: Agenda for Informal FAA Airspace Meeting  
No. 30 to be held May 15, 1962**

Our next meeting will be on Tuesday, May 15, 1962, at 10:00 A.M. in Conference Room 16, FAA Headquarters, Federal Building, New York International Airport, Jamaica 30, New York. Conference Room 16, on street level, is best reached by the South Entrance to the Building.

These meetings give aviation interests the opportunity to comment on agenda items proposed for formal airspace action.

We urge your attendance. We solicit your ideas and recommendations. Active participation will promote better understanding and provide constructive discussion helpful in resolving problems.

**CHAS. H. NEWPOL  
for JOSEPH J. REGAN  
Chief, Air Traffic Division**

J.A. 15

FAA AIRSPACE MEETING NO. 30

May 15, 1962

Agenda Item No. 10

MITCHELLVILLE, MARYLAND—PROPOSED CONSTRUCTION OF  
230 KV TRANSMISSION LINE; CASE No. 1-OE-1202

DISCUSSION:

1. The Federal Aviation Agency is conducting an aeronautical study to determine the effects on airspace utilization of the following proposal:  
Applicant: Potomac Electric Power Company  
Location: Mitchellville, Maryland  
Height: Above Ground } See attached  
Above Mean Sea Level } sketch.
2. The applicant proposes to construct two double circuit 230 KV transmission lines supported on steel towers, 125 feet above ground and spanned approximately 800 feet apart. The towers and transmission circuits will be located upon a 250 foot right of way strip which abuts the property line of the Freeway Airport, Mitchellville, Maryland.
3. Our preliminary study indicated that the section which passes west of Freeway Airport would exceed the hazard criteria of Part 626.12(a)(6) as applied to all of the runways at this airport. (See attached sketch for relative proximity of transmission line and runways.)
4. This proposal was circularized for aeronautical comment by letter, dated March 14, 1962.
5. Aeronautical objections were made in response to the circularization based upon the conclusion that the proposed construction immediately adjacent to the Freeway Airport would necessitate closing the E/W and NW/SE runways and create a hazardous operating condition for the remaining runways.
6. Additional written formal comments to be included in the record will be accepted prior to or at the meeting.

J.A. 16

FEDERAL AVIATION AGENCY  
UNITED STATES GOVERNMENT

**Memorandum**

Date: June 8, 1962

Subject: FAA Airspace Meeting No. 30—May 15, 1962

From: Program Coordinator, Airspace Utilization  
Branch

To: Files

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*Agenda Item No. 10*

Mitchellville, Maryland—Proposed Construction of 230  
KV Transmission Line; Case No. 1-OE-1202

The proposal and written comments to our circularization were reviewed. User representatives were advised that the proposal penetrated the approach surfaces of all four runways of the Freeway Airport, Mitchellville, Maryland. The proximity to the East/West and Northwest/Southeast Runways was such that the erection of the transmission line would negate the use of these runways. Approaches to and departures from the Northeast/Southwest Runway would be seriously compromised.

Mr. Cornelius Means, Counsel for the Potomac Electric Power Company, took the position that the Freeway Airway was, in fact, not an airport because the authority to operate as such had never been given by the Planning Board, Prince George County, Maryland. Mr. Means felt a decision relevant to the erection of the transmission line at the proposed location, hinged on the legal existence of the airport. This necessitated obtaining a special exception from the Zoning authorities. He stated, further, that the cost of placing the line underground was prohibitive and not technically feasible because of the high voltage involved.

Mr. Merrill Armour, Counsel for Irvin Rodenhauser, owner of Freeway Airport, replied that the airport is licensed

by the State of Maryland and does not require special zoning authorization. The airport dates back to 1942 and was licensed in 1959; there are about 20 planes based at the airport.

The Chairman made the point that the issue is not whether the airport legally exists but, rather, does the proposal present a hazard to the airport. The legality of the airport as it pertains to the Zoning laws, is related to the jurisdiction of the Zoning Board. We are not in the position to pass on the validity of the Zoning regulations.

After much discussion which emphasized continually the validity of the airport, particularly between the attorneys for the proponent and the airport, the following comments on the proposal were made:

AOPA—assuming the airport is operating legally, it is a hazard.

U.S. Navy—if 626 is valid, valid objection.

NBAA—no comment.

NPA—oppose it as constituting a hazard to the airport.

JOHN F. LEE  
JOHN F. LEE, EA-551

• • • • •

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FEDERAL AVIATION AGENCY

**Determination of Hazard to Air Navigation**

(OE Docket No. 62-EA-4)

The Federal Aviation Agency has circularized the following proposal for aeronautical comment and has conducted a study to determine its effect upon the safe and efficient utilization of airspace.

The Potomac Electric Power Company proposes to construct two double circuit 230,000 volt transmission lines

J.A. 18

and supporting steel towers near Mitchellville, Maryland, aligned in a north/south direction near latitude 38° 56' 00" north, longitude 76° 46' 00" west, at an over-all height of 285 feet above mean sea level (125 feet above ground).

Based upon the aeronautical study, it is the finding of the Agency that the proposed structures, which would be constructed within a 250-foot wide strip of property adjoining the Freeway Airport, Mitchellville, Maryland, would render the East/West and Northwest/Southeast runways unusable, would derogate the use of the Northeast/Southwest runway, and would have a substantial adverse effect upon aeronautical operations at the Freeway Airport.

Pursuant to the authority delegated to me by the Administrator (14 CFR 626.33) it is found that the proposed structure would have a substantial adverse effect upon aeronautical operations at the Freeway Airport and it is hereby determined that the proposed structure would be a hazard to air navigation.

This determination is effective as of the date of issuance and will become final 30 days thereafter unless an appeal is filed under Section 626.34 (14 CFR 626.34). If the appeal is denied, the determination will then become final as of the date of the denial or 30 days after the issuance of the determination, whichever is later.

JOSEPH VIVARI  
Joseph Vivari, *Acting Chief*  
*Obstruction Evaluation Branch*

Issued in Washington, D. C., on October 19, 1962

BEFORE THE ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY

OE Docket No. 62-EA-4

In the Matter of

POTOMAC ELECTRIC POWER COMPANY

Determination of Hazard to Air Navigation

**Petition for Public Hearing**

The undersigned, Potomac Electric Power Company, the sponsor of the proposed construction project referred to in the above-captioned Determination,\* hereby petitions the Administrator of the Federal Aviation Agency, pursuant to the provisions of § 626.34 of the Regulations of the Administrator (14 CFR 626.34), for a public hearing for the purpose of obtaining a formal decision of the Administrator on the matter, and as grounds therefor states that:

1. The Petitioner is a District of Columbia and Virginia corporation having its principal place of business at 929 E Street, Northwest, Washington 4, D. C. It is engaged in the generation, transmission, distribution and sale of electric power and energy in the District of Columbia and in the States of Maryland and Virginia, and is subject to regulation by the Public Utilities Commission of the District of Columbia, the Public Service Commission of Maryland, the State Corporation Commission of Virginia and the Federal Power Commission.

2. The Petitioner is the sole supplier of electric power and energy to the public (including most of the buildings, installations and facilities of the United States Government located in the Petitioner's service area) in the District of Columbia, in a small portion of Arlington County,

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\* F.R. Doc. 62-10849, published in the Federal Register, issue of October 31, 1962 (Volume 27, No. 212), at page 10593.

Virginia, and in large portions of Montgomery and Prince George's Counties, Maryland. Attached hereto as Exhibit A is a general map of the Petitioner's service area and electric system dated August 31, 1962.

3. The Petitioner presently owns and operates steam-electric generating stations, having an aggregate net capability of 1,564,500 kilowatts, located on the Potomac River in Alexandria, Virginia, on the Anacostia River at Benning and Buzzard Point in the District of Columbia and on the Potomac River at Dickerson, Montgomery County, Maryland.

4. The Petitioner's electric system is presently, and for many years past has been, interconnected with that of Baltimore Gas and Electric Company through various tie lines, the principal one of which is a 230,000 volt, steel tower transmission line extending between the Petitioner's Burtonsville Substation No. 120 in Prince George's County, Maryland, and the Howard Substation of said Baltimore Gas and Electric Company near Ellicott City, Maryland.

5. In June, 1959, the Petitioner placed in service the first generating unit at its Dickerson, Maryland, generating station. Such generating station is connected with the Petitioner's electric system by means of two 230,000 volt, steel tower, transmission lines extending between said generating station and the Petitioner's said Burtonsville Substation No. 120.

6. As indicated above, the aggregate net capability of the Petitioner's existing generating facilities is 1,564,500 kilowatts. On August 21, 1962 the Petitioner's gross 60-minute integrated peak load reached a new high of 1,395,000 kilowatts. Since during the past ten years the Petitioner has experienced an average annual growth in its peak load of approximately 9% it is essential that the Petitioner place additional generating facilities in operation prior to the Summer of 1964 (the Summer being the

period during which the Petitioner experiences its annual peak load).

7. The Petitioner is now engaged in constructing a new steam-electric generating station at Chalk Point on the Patuxent River in the extreme southeasterly corner of Prince George's County, Maryland. The first generating unit at such station (having a net capability of 324,000 kilowatts) is to go into operation in the Spring of 1964 and a second, identical unit is to go into operation in the Spring of 1965.

8. In order to be able to connect said Chalk Point generating station with its electric system, the Petitioner has acquired substantially all of a 250 foot wide right-of-way extending from said Chalk Point generating station to its above-mentioned Burtonsville Substation No. 120. The locations of said generating station and said substation, and the course of said right-of-way, are shown on Exhibit A hereto. Said Exhibit A also shows the location, adjacent to said right-of-way, of the Freeway Airport at Mitchellville, Maryland, which is the airport referred to in the above-captioned Determination.

9. In September, 1956, the Petitioner secured an option on the Chalk Point generating station site and immediately began a study to fix the route to be followed by the right-of-way for the transmission lines needed to connect such station to the Petitioner's said Burtonsville Substation No. 120. By mid-1958 such route (including the portion of the right-of-way in the vicinity of said Freeway Airport) had been largely determined (using aerial photographs which gave no indication of any airport operation on the property which is now the site of said Freeway Airport), and by November 16, 1960 all but one of the necessary property acquisitions in the vicinity of such airport had been completed. The final such acquisition was completed on May 9, 1961.

10. Petitioner proposes to construct on said right-of-way two 230,000 volt, steel tower, double circuit transmission lines, with each of such towers having a height of approximately 125 feet above ground level and with the towers on each line to be located at intervals of approximately 1,000 feet.

11. The location, construction, maintenance and operation of said steel tower transmission lines, including the portions thereof in the vicinity of said Freeway Airport, is essential to the performance by the Petitioner of its public utility obligations, and essential to the furnishing of adequate electric service to the Washington Metropolitan Area, including the many governmental buildings, installations and facilities located therein.

12. Said Freeway Airport is a privately owned and operated airport used solely by light aircraft operated for private pleasure, sport and/or business.

13. The Form FAA-2681, seeking airspace clearance, filed with the Federal Aviation Agency by the owner and operator of said Freeway Airport was dated December 16, 1961 and indicated that such owner and operator was then aware of the Petitioner's proposed transmission line construction in the vicinity of the airport. The Petitioner was given no opportunity to be heard with respect to the propriety of granting such airspace clearance to such airport.

14. The above-captioned Determination finds "that the [Petitioner's] proposed structure would have a substantial adverse effect upon aeronautical operations at the Freeway Airport" and determines "that [such] proposed structure would be a hazard to air navigation", which said determination, if it should become final, might, conceivably, cast doubt upon the Petitioner's right to construct, maintain and operate said transmission lines or subject the Petitioner to liability in the event an aircraft, in the course of its use of said Freeway Airport, should come into con-

tact with essential public service facilities constructed and maintained by the Petitioner on its said 250 foot wide right-of-way in the vicinity of said airport.

15. The above-captioned Determination made no finding or determination as to what action should be taken for the protection of persons and property on the ground or as to what, in the public interest, would be the most efficient utilization of the navigable airspace above the Petitioner's said 250 foot wide right-of-way in the vicinity of said Freeway Airport, and in the making of said Determination no consideration was given to the large public interest affecting the Petitioner's operations as a public utility or to the essential public service nature of the facilities proposed to be constructed, maintained and operated by the Petitioner on its said right-of-way.

WHEREFORE, the Petitioner prays that a public hearing, under Subpart D of Part 626 of the Regulations of the Administrator, be conducted on the Petitioner's said proposed construction in order to determine, in the light of the over-all public interest, the effect of the proposed construction upon the safety of aircraft and, even more importantly, upon the efficient utilization of the navigable airspace.

Respectfully submitted,

POTOMAC ELECTRIC POWER COMPANY

By GEORGE BISSET,  
George Bisset,  
*Senior Vice President.*

Washington, D. C.  
November 16, 1962.

CORNELIUS MEANS,  
929 E Street, N. W.,  
Washington 4, D. C.  
*Attorney for Potomac Electric  
Power Company.*

DISTRICT OF COLUMBIA, ss.:

GEORGE BISSET, being first duly sworn on his oath, deposes and says that he is the Senior Vice President of Potomac Electric Power Company, the Petitioner named in the foregoing Petition, that he has read said Petition by him subscribed, that he knows the contents thereof, and that the matters and things therein stated he verily believes to be true.

GEORGE BISSET  
George Bisset

Subscribed and sworn to before me this 16th day of November, 1962. My Commission expires June 14, 1965.

[NOTARIAL SEAL]

INDIANA C. SHEPP,  
Indiana C. Shepp,  
*Notary Public, D. C.*

---

BEFORE THE ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY

OE Docket No. 62-EA-4

In the Matter of

POTOMAC ELECTRIC POWER COMPANY

Determination of Hazard to Air Navigation

**Answer to Petition for Public Hearing**

Irvin R. Rodenhauser and Frances M. Rodenhauser, Church Road, Box 163, Mitchellville, Maryland, are the proprietors of the Freeway Airport, located at the intersection of John Hanson Highway and Church Road, Mitchellville, Maryland. They hereby make answer to the petition for public hearing filed herein on November 16, 1962 by the Potomac Electric Power Company:

1. The Rodenhausers do not object to a public hearing in this matter.

2. However, the petition for public hearing filed by the Potomac Electric Power Company does not show an adequate foundation for said petition, and such hearing should be denied until an adequate petition is filed; Section 626.34 of the Regulations of the Administrator. Section 626.12 provides that a proposed structure which would extend above certain specified criteria would ultimately be determined to be a hazard to air navigation unless, upon an aeronautical study of the structure under this part, the Agency finds that notwithstanding violation of criteria, such construction would not constitute a hazard. A preliminary study by the Agency indicated that the proposed transmission lines and supporting towers would exceed the hazard criteria of Part 626.12(a)(6) as applied to all of the runways of Freeway Airport. Further, the Agency determination of October 19, 1962 concludes that the proposed structures would render two of the three runways unusable, and would derogate the use of the third runway, and would have a substantial adverse effect on aeronautical operations at the Freeway Airport.

3. The proponent of the structures does not deny the result of the Agency's preliminary study, nor does it deny the conclusions of the Agency's determination of October 19, 1962. Unless in some way the proponent alleges that the results and conclusions reached by the Agency are in error, by alleging that the proposed structures would not violate any of the criteria of 626.12, or that notwithstanding violation of such criteria, such construction would not constitute a hazard, the petition for public hearing does not have adequate foundation, and the hearing should be denied.

4. The Rodenhausers would be prejudiced by the grant of a public hearing upon the present petition, for the reason that they presently contemplate becoming a party to any hearing that may be awarded, and in order for them to adequately meet the issues raised by the proponent it

J.A. 26

will be necessary for them to have some advance notice of what they will be.

Respectfully submitted,

s/ JOHN S. YODICE  
Armour, Herrick, Kneipple &  
Allen  
1001-15th St., N. W.  
Washington, D. C.  
*Attorneys for the  
Rodenhauers*

---

**FAA Letter to Pepco, Dated February 1, 1963. Denying  
Petition for Public Hearing**

FEDERAL AVIATION AGENCY  
WASHINGTON 25, D.C.

February 1, 1963

OFFICE OF THE ADMINISTRATOR

Dear Mr. Bisset:

This is in reply to your petition dated November 16, 1962, for a public hearing with respect to the Agency's determination in OE Docket No. 62-EA-4.

We regret to inform you that our examination of this matter forces us to deny the petition for a hearing. The grounds given as the basis for obtaining a hearing and formal decision of the Administrator do not constitute adequate foundation for the granting of a hearing pursuant to Section 77.39(c)(New) of the Regulations.

J.A. 27

Accordingly, you are advised that your petition for public hearing may not be granted.

Sincerely,

HAROLD W. GRANT

Harold W. Grant

Lieutenant General, USAF

Deputy Administrator

Mr. George Bisset  
Senior Vice President  
Potomac Electric Power Company  
929 E Street, N. W.  
Washington 4, D. C.

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17706

POTOMAC ELECTRIC POWER COMPANY, 929 E Street, N. W.,  
Washington 4, D. C., *Petitioner,*

vs.

N. E. HALABY, Administrator of the Federal  
Aviation Agency, *Respondent.*

**Petition for Review Under Sec. 1006(a) of the  
Federal Aviation Act of 1958**

*To the Honorable, the United States Court of Appeals for  
the District of Columbia Circuit:*

The Petitioner herein, Potomac Electric Power Company, a District of Columbia and Virginia corporation having its principal place of business at 929 E Street, N. W., Washington 4, D. C., and engaged in the generation, transmission and distribution to the public of electric power and energy in the Washington metropolitan area, hereby respectfully petitions this Honorable Court to review, pursuant to Sec. 1006(a) of the Federal Aviation

Act of 1958 [P.L. 85-726, August 23, 1958; 72 Stat. 795; U.S.C. Title 49, §1486(a)], certain orders issued by, or under the authority of, the respondent Administrator of the Federal Aviation Agency (the "Administrator") as hereinafter set forth.

# I. NATURE OF PROCEEDINGS

1. The proceedings as to which review is sought were under Subparts A, B and C of Part 626 of Subchapter E of Chapter III of Title 14 of the Code of Federal Regulations, as such Subparts were in effect prior to December 12, 1962.\*

2. Such proceedings resulted in the issuance by the Acting Chief of the Obstruction Evaluation Branch of the Federal Aviation Agency, on October 19, 1962, allegedly pursuant to authority delegated to him by the Administrator, of a "Determination of Hazard to Air Navigation (OE Docket No. 62-EA-4)", determining that certain above-ground electric transmission facilities proposed to be constructed, operated and maintained by the Petitioner on its fee-owned real property would be a "hazard to air navigation" in respect of a certain privately owned and operated airport located adjacent to Petitioner's said real property. Said Determination made no provision for the payment of any compensation to the Petitioner. During the course of such proceedings, the Petitioner was given no opportunity to be heard as to the respective public interests to be served by its said facilities and by the air navigation related to said airport.

3. On November 16, 1962, being a date within 30 days of the date of issuance of said Determination, the Petitioner filed a petition with the Administrator for a public hearing for the purpose of obtaining a formal decision of the Administrator on the matter, as required by the Adminis-

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\* Effective December 12, 1962, Part 626 was deleted from Chapter III of Title 14, CFR, and in its place was substituted Part 77 of Subchapter E [New] of Chapter I of said Title 14.

trator's then effective regulations (14 CFR 626.34) in order to prevent said Determination from becoming final.

4. Subsequently, by letter dated February 1, 1963, the Petitioner was advised by the Deputy Administrator of the Federal Aviation Agency that such petition was denied. Under the provisions of § 77.37(b) of Part 77 of Subchapter E [New] of Chapter I of Title 14 of the Code of Federal Regulations said Determination became final upon the denial of such petition.

## II. VENUE

1. Sec. 1006(a) of the Federal Aviation Act of 1958 [P.L. 85-726, August 23, 1958; 72 Stat. 795; U.S.C. Title 49, § 1486(a)] provides that any order, affirmative or negative, issued by the Administrator under the Act (with one non-relevant exception) shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order.

2. Sec. 1006(b) of said Act [P.L. 85-726, August 23, 1958; 72 Stat. 795; U.S.C. Title 49 § 1486(b)] provides that the petition for review shall be filed in the court for the circuit where the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

## III. GROUNDS UPON WHICH RELIEF IS SOUGHT

The Petitioner asserts that, if said Determination could operate in any way to prejudice the Petitioner in its construction, operation and maintenance of said above-ground electric transmission facilities on its said fee-owned real property, or to impair or affect adversely any right or

rights which the Petitioner would otherwise have in connection with its said use of said property, then:

(a) The Administrator lacks statutory authority to make said Determination.

(b) If such statutory authority be found to exist, its said exercise by the Administrator, without the payment of just compensation to the Petitioner, is an unlawful exercise of said statutory authority as constituting a taking of the property of the Petitioner for public use in violation of the Fifth Amendment to the Constitution of the United States.

(c) If such statutory authority be found to exist and if it may, constitutionally, be exercised by the Administrator without the payment of just compensation to the Petitioner, it may be exercised by the Administrator only (i) after the Petitioner has had an opportunity to present evidence as to the respective public interests to be served by its said facilities and by said air navigation, and (ii) upon the basis of appropriate findings by the Administrator as to the efficient utilization of the navigable airspace, which findings are supported by, among other things, substantial evidence of record that the public interest to be served by said air navigation is superior to the public interest to be served by the Petitioner's said facilities.

WHEREFORE, the Petitioner prays that review of said proceedings be granted and that, upon such review, an appropriate order be entered either (i) dismissing this Petition on the ground that said Determination cannot operate in any way to prejudice the Petitioner in its said use of its said fee-owned real property, or to impair or affect adversely any right or rights which the Petitioner would otherwise have in connection with its said use of said property; or (ii) setting aside said Determination and dismissing said proceedings; or (iii) setting aside said letter order of February 1, 1963, directing that the

Petitioner be granted a public hearing at which it may present evidence as to the respective public interests to be served by its said proposed facilities and by said air navigation, and directing the Administrator, in making his final determination, to make appropriate findings, in the light of, among other things, such evidence, on the efficient utilization of the navigable airspace.

Respectfully submitted,

POTOMAC ELECTRIC POWER COMPANY

By S. R. WOODZELL

S. R. Woodzell

*Senior Vice President*

Washington, D. C.,

March 15, 1963.

CORNELIUS MEANS

Cornelius Means

929 E Street, N. W.,

Washington 4, D. C.,

*Attorney for the Petitioner*

J.A. 32

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,706

POTOMAC ELECTRIC POWER COMPANY, *Petitioner*

v.

N. E. HALABY, Administrator of the Federal Aviation  
Agency, *Respondent*

---

ON PETITION FOR REVIEW OF AN ORDER OF THE ADMINISTRATOR  
OF THE FEDERAL AVIATION AGENCY

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Stipulation of Issues and Schedule for Designation of Record  
and Briefing

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1. Pursuant to Rule 38(g) of this Court, it is hereby stipulated and agreed by counsel for the Potomac Electric Power Company and the Federal Aviation Agency, that the material issues presented by this petition are:

- a. Whether this Court has jurisdiction to review the determination by the Federal Aviation Administrator that the proposed construction of power lines by Potomac Electric Power Company on property abutting the Freeway Airport would constitute a hazard to air navigation.
- b. Whether the Administrator has statutory authority (a) to make a determination that a proposed structure would be a hazard to air navigation, and (b) to do so without providing for just compensation.
- c. Assuming that the Administrator has such authority, whether it may be exercised without affording the

petitioner an opportunity to present evidence as to the respective public interests involved in the airport and in petitioner's power lines, and without the Administrator making findings in the light thereof as to the efficient utilization of the navigable airspace.

2. It is further stipulated and agreed that the designations for printing shall be served, and the briefs filed, according to the following schedule:

- a. Petitioner shall serve a designation of portions of the record for printing in the joint appendix on or before May 16, 1963.
- b. Respondent (and intervenor, if any) shall serve a designation of any additional portion of the record for printing on or before May 23, 1963.
- c. Petitioner's brief and the joint appendix shall be due on or before June 17, 1963.
- d. Respondent's (and intervenor, if any) brief shall be due on or before July 26, 1963.
- e. Petitioner's reply brief, if any, shall be due on or before August 15, 1963.

LIONEL KESTENBAUM  
Department of Justice  
Washington 25, D. C.  
*Attorney for Respondent*

CORNELIUS MEANS  
Potomac Electric Power Company  
929 E Street, N. W.  
Washington, D. C.  
*Attorney for Petitioner*

J.A. 34

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 17,706

POTOMAC ELECTRIC POWER COMPANY

v.

N. E. HALABY

Before: FAHY, Circuit Judge, in Chambers.

**Prehearing Order**

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: May 13, 1963

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,706

POTOMAC ELECTRIC POWER COMPANY, 929 E Street, N. W.,  
Washington 4, D. C., *Petitioner*

vs.

N. E. HALABY, Administrator of the Federal Aviation  
Agency, *Respondent*

**Motion of Irvin R. and Frances M. Rodenhauser for  
Leave to Intervene**

Now comes Irvin R. and Frances M. Rodenhauser (hereinafter called the Rodenhausers), pursuant to Rule 38 (f) of the Court's Rules, to move the Court for leave to intervene in the above-entitled case, and for grounds states as follows:

1. The Rodenhausers reside at Church Road, Box 163, Mitchellville, Maryland, and are the proprietors of the Freeway Airport, located at the intersection of John Hanson Highway and Church Road, Mitchellville, Maryland.
2. The petitioner proposes to construct, operate and maintain certain above-ground electric transmission facilities on its fee-owned real property which is adjacent to Freeway Airport.
3. Certain administrative proceedings concerning the petitioner's proposal were had before the Federal Aviation Agency, and the Rodenhausers because of their interest were a party to these proceedings. The proceedings resulted in the issuance by the Acting Chief of the Obstruction Evaluation Branch of the Federal Aviation Agency, on October 19, 1962, pursuant to authority delegated to him by the Administrator, of a "Determination of Hazard to Air Navigation (OE Docket No. 62-EA-4)," determining that the petitioner's proposed transmission facilities, if

erected, would constitute a hazard to air navigation in that they would render two of the runways at Freeway Airport unusable, would derogate the use of the third runway, and would have a substantial adverse effect upon aeronautical operations at the Freeway Airport. Petitioner's request to the Administrator for a public hearing for the purpose of obtaining a formal decision of the Administrator on the matter was denied.

4. The Rodenhauers, as owners of Freeway Airport, have a substantial interest in all of the matters raised by the petitioner in this appeal. While it may be that the interest of the Rodenhauers is the same or similar to the interest of the Administrator and, therefore, may be represented by the Administrator in this appeal, the Rodenhauers have no assurance of this.

WHEREFORE, the Rodenhauers move the Court for leave to intervene and participate as a party in the above-entitled case.

Respectfully submitted,

JOHN S. YODICE  
John S. Yodice  
6406 Georgia Ave., N. W.  
Washington, D. C.

MERRILL ARMOUR  
Merrill Armour  
1001 - 15th St., N. W.  
Washington 5, D. C.  
*Attorneys for the Rodenhauers*

J.A. 37

Filed Jun. 3, 1963

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,706

September Term, 1962

POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

v.

N. E. HALABY, Administrator, Federal Aviation Agency,  
*Respondent.*

Before: Fahy, Danaher and Wright, Circuit Judges, in  
Chambers.

**Order**

On consideration of the unopposed motion of Irvin R. and Frances M. Rodenhauser for leave to intervene, it is

ORDERED by the court that Irvin R. and Frances M. Rodenhauser are hereby granted leave to intervene and to file a single brief in this case.

Per Curiam.

Dated: Jun. 3, 1963

2

BRIEF FOR RESPONDENT

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,706

POTOMAC ELECTRIC POWER COMPANY, PETITIONER

v.

N. E. HALABY, ADMINISTRATOR OF THE  
FEDERAL AVIATION AGENCY, RESPONDENT

---

ON PETITION FOR REVIEW OF AN ORDER OF THE  
ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY

---

WILLIAM H. ORRICK, JR.,  
Assistant Attorney General,

LIONEL KESTENBAUM,  
I. DANIEL STEWART, JR.,  
Attorneys,

Department of Justice,  
Washington, D.C. 20530.

States Court of Appeals

FILED AUG 24 1966

CLERK

### **COUNTER-STATEMENT OF QUESTIONS PRESENTED**

The parties have stipulated that the following issues are presented by this case (J.A. 32):

1. Whether this Court has jurisdiction to review the determination by the Federal Aviation Administrator that the proposed construction of power lines by Petenac Electric Power Company on property abutting the Freeway Airport would constitute a hazard to air navigation.
2. Whether the Administrator has statutory authority  
(a) to make a determination that a proposed structure would be a hazard to air navigation, and (b) to do so without providing for just compensation.
3. Assuming that the Administrator has such authority, whether it may be exercised without affording the petitioner an opportunity to present evidence as to the respective public interests involved in the airport and in petitioner's power lines, and without the Administrator making findings in the light thereof as to the efficient utilization of the navigable airspace.

## INDEX

	Page
Counter-statement of questions presented.....	1
Counter-statement of the case.....	1
Statute and regulations involved.....	6
Summary of argument.....	6
Argument:	
A. An FAA determination that a proposed structure will be an air hazard is a declaration that incompatibility exists between the structure and aeronautical activity but does not itself prohibit or limit either use.....	8
B. The FAA determination below is not a reviewable order.....	15
C. The determination is valid.....	22
Conclusion.....	23
Appendix.....	24

## CITATIONS

### Cases:

<u>Air Terminal Properties v. New York</u> , 172 Misc. 945, 16 N.Y.S. 2d 629.....	14
<u>C &amp; S Airlines, Inc. v. Waterman Steamship Corp.</u> , 333 U.S. 103.....	16, 18
<u>California Oregon Power Co. v. Federal Power Commission</u> , 99 U.S. App. D.C. 263, 239 F. 2d 426.....	16, 17
<u>Capitol Airways, Inc. v. Indianapolis Power &amp; Light Co.</u> , 215 Ind. 462, 18 N.E. 2d 776.....	14
<u>Carolina Aluminum Co. v. Federal Power Commission</u> , 97 F. 2d 435.....	17
<u>Commonwealth ex rel. Schnader v. Von Bestecki</u> , 30 Pa. D & C 137, [1937] US App. 1.....	14
<u>Continental Bank &amp; Trust Co. v. Martin</u> , 112 U.S. App. D.C. 354, 303 F. 2d 214.....	17
<u>Eccles v. Peoples Bank</u> , 333 U.S. 426.....	18
<u>Federal Power Commission v. Hope Natural Gas Co.</u> , 320 U.S. 591.....	18
<u>Frozen Food Express v. United States</u> , 351 U.S. 40.....	14
<u>Guith v. Consumer's Power Co.</u> , 36 F. Supp. 21.....	14
<u>John P. Agnew &amp; Co. v. Hooze</u> , 69 U.S. App. D.C. 116, 99 F. 2d 349.....	17
<u>Helco Products Co. v. McNutt</u> , 78 U.S. App. D.C. 71, 137 F. 2d 681.....	17
<u>Iowa City v. Tucker</u> , [1936] US App 10.....	14
<u>Liles v. Jarnigan</u> , [1950] US App 90.....	14

	Page
<b>Cases: - Continued</b>	
<u>National Labor Relations Board v. Express Publishing</u>	
Co., 312 U.S. 426.....	16
<u>Odom v. Thompson</u> , 85 F. Supp. 477.....	16
<u>Reaver v. Martin Theaters of Florida</u> , 52 So. 2d 682.....	14
<u>Roosevelt Field v. Town of North Hempstead</u> , 84 F. Supp.	
456.....	20
<u>Roosevelt Field v. Town of North Hempstead</u> , 88 F. Supp.	
177.....	14, 20
<u>Simmons v. Federal Communications Commission</u> , 79 U.S App.	
D.C. 264, 145 F. 2d 578.....	15
<u>United States v. Los Angeles &amp; Salt Lake R. Co.</u> , 273 U.S.	
299.....	17

**Statutes:**

**Federal Aviation Act:**

Section 101(24), 41 U.S.C. 1301(24).....	19, 22
Section 103, 49 U.S.C. 1303.....	8
Section 104, 49 U.S.C. 1304.....	19
Section 307(a), 49 U.S.C. 1348(a).....	8, 12, 19
Section 307(b), (c), 49 U.S.C. 1348(b), (c).....	8
Section 312, 49 U.S.C. 1353.....	8
Section 313(a), 49 U.S.C. 1354(a).....	9
Section 901, 49 U.S.C. 1472.....	16
Section 1006, 49 U.S.C. 1486.....	16
Section 1007, 49 U.S.C. 1487.....	16
Federal Communications Act: Section 303(q), 47 U.S.C. 303(q).....	15

**Regulations:**

**Federal Aviation Agency Rules:**

**Part 625, 14 CFR:**

Section 625.6(b), (c).....	14
----------------------------	----

**Part 626, 14 CFR:**

Section 626.1(b)(5).....	10
Section 626.9.....	3, 10
Section 626.10.....	3, 10
Section 626.11.....	3, 10
Section 626.12.....	10
Section 626.13.....	3, 10
Section 626.30.....	3
Section 626.32.....	11, 13
Section 626.33.....	11
Section 626.34.....	4, 12
Section 626.50.....	12, 15
Section 626.51.....	12
Section 626.63.....	12
Section 626.64.....	3, 12

	Page
<b>Regulations: - Continued</b>	
Section 626.75.....	10
Section 626.76.....	10
Part 77 effective December 12, 1962, 27 F.R. 10357.....	3
<b>Federal Communications Commission Rules:</b>	
Part 17, 47 CFR:	
Section 17.4.....	15
Section 17.21 - 17.45.....	15
<b>Miscellaneous:</b>	
Hearings on "Review of the Federal Aviation Act," Aviation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2nd Sess., Part 2.....	13

### COUNTER-STATEMENT OF THE CASE

The basic facts in this case are not in dispute.

Freeway Airport is located near Mitchellville, Maryland, and has been in operation since 1942 or 1946 (J.A. 12, 17).<sup>1/</sup> It is owned by Irvin R. Rodenhauser and his wife Frances M. Rodenhauser, who are intervenors in this case. In 1959 the State of Maryland issued a commercial license for the operation of the airport (J.A. 1, 17). About twenty planes, which are used for pleasure, sport, and business, are now based there (J.A. 17, 22). The airport has four runways as shown on the map at J.A. 9--a north-south runway 3,400 feet long; an east-west runway 1,800 feet long; a northeast-southwest runway 1,800 feet long; and a northeast-southeast runway 2,000 feet long (J.A. 20).

Petitioner, Potomac Electric Power Company (Pepco), is a public utility that supplies electricity to the District of Columbia and parts of the states of Virginia and Maryland (J.A. 19). In 1956 Pepco acquired an option on a site at Chalk Point on the Patuxent River, Prince Georges County, Maryland, for the purpose of building a steam-electric generating station (J.A. 20, 21). The first generating unit at the new station is scheduled to go into operation in the spring of 1964, and a second in the spring of 1965 (J.A. 21).

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<sup>1/</sup> "J.A." refers to the joint appendix which is printed in the same volume as petitioner's brief.

To connect the Chalk Point station with its distribution system, Pepco planned to build transmission lines from Chalk Point to its Burtonsville substation, which is also located in Maryland (J.A. 21). The prospective transmission line route was laid out on the basis of aerial photographs and was largely determined by mid-1958 (J.A. 21). Thereafter Pepco bought a 250-foot right-of-way between Chalk Point and Burtonsville, a portion of which abuts directly on the Freeway Airport property. Pepco alleges that the aerial photographs did not reveal the existence of the airport (J.A. 21).<sup>2/</sup>

Pepco's intended power lines will be 230,000 volt, double circuit transmission lines which will be supported by steel towers 125 feet high, spaced at approximately 800 feet intervals (J.A. 2, 22). They will run parallel to the airport's western boundary and will be located a few feet from the end of two of the four runways. The extended center line of the east-west runway will intersect the power lines at about a 90 degree angle, and the extended center line of the northwest-southeast runway will intersect the lines at about a 45 degree angle (J.A. 9). If the transmission lines are constructed according to plans, their proximity to the airport will render these two runways unusable (J.A. 18).

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<sup>2/</sup> At the time of the aerial survey, it appears that none of the runways at Freeway had been paved (see J.A. 1).

In compliance with Part 626 of the Federal Aviation Agency Rules, 14 CFR (Revised as of January 1, 1962) Section 626.9, 626.10<sup>3/</sup> Pepco gave notice on Form FAA-117 of its plans to construct the Chalk Point--Burtonsville power line (J.A. 2).

On February 16, 1962, the Chief of the New York Regional Airspace Utilization Branch of the Federal Aviation Agency, informed Pepco by letter that on the basis of FAA-117 and its attachments a "preliminary determination" had been made that the proposed power lines would constitute a "hazard to air navigation" (J.A. 4), under 14 CFR 626.11 - 626.13. The letter stated that the proposed power line would interfere with the runway approach surfaces of all four runways, the degree of violation of FAA criteria varying from approximately 63 feet to 125 feet above ground (*ibid.*). The letter suggested the possibility of relocating the lines and advised Pepco of its right to request an "aeronautical study" within thirty days, which petitioner duly requested (J.A. 6).

In accordance with the procedure prescribed by the FAA rules (14 CFR 626.30 - 626.64), an aeronautical study was initiated (J.A. 7). Comments were received as to the effect of Pepco's proposal on aeronautical activity from, among others, the Airline Owners and Pilots Association (J.A. 10); the United States Army (J.A. 11); and National Pilots Association (J.A. 11). An informal meeting, attended by FAA officials, Pepco,

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<sup>3/</sup> Part 626 has been amended and redesignated Part 77 effective as of December 12, 1962, 27 F.R. 10357 (1962), with no substantial changes pertinent to this case. In this brief, we refer to the regulations in effect during the proceedings below, i.e., Part 626 revised as of January 1, 1962.

and other interested parties, was held May 15, 1962 in the FAA offices at Jamaica, New York in which the proposal and comments made in response to the FAA circularization were reviewed. In a memorandum summarizing the proceedings of that meeting, it was pointed out that the proposed power lines would penetrate the approach surfaces of all four runways at the Freeway Airport; that two of the runways would be closed; and that approaches to and departures from one other runway would be seriously affected (J.A. 16-17).

Based upon the aeronautical study, the acting chief of the Obstruction Evaluation Branch of the FAA issued a document on October 19, 1962 entitled "Determination of Hazard to Air Navigation" which stated (J.A. 17-18, at 18):

Pursuant to the authority delegated to me by the Administrator (14 CFR 626.33) it is found that the proposed structure would have a substantial adverse effect upon aeronautical operations at the Freeway Airport and it is hereby determined that the proposed structure would be a hazard to air navigation.

Pepco filed a petition pursuant to Section 626.34 to obtain a public hearing and a formal decision by the Administrator on the proposed construction "in the light of the over-all public interest, the effect of the proposed construction upon the safety of aircraft and, even more importantly, upon the efficient utilization of the navigable airspace" (J.A. 19-23). In its petition Pepco complained that the "Determination of Hazard" made no findings with respect to the most efficient utilization of the airspace above its 250-foot right of way in the vicinity of the airport and that no consideration was

given to the public interest involved in Pepco's operation as a public utility (J.A. 23). The petition was denied February 1, 1963 because the ground asserted did not constitute "adequate foundation" for convening a hearing (J.A. 26-27).

Pepco filed a petition for review in this Court on March 16, 1963 (J.A. 27-31).<sup>4/</sup> The petition asserted (J.A. 29-30) that if the Determination of Hazard could operate in any way to prejudice petitioner's construction and use of its transmission lines or adversely affect the property rights therein, the Administrator lacked statutory authority to issue it. Petitioner further urged that if such authority existed the Administrator's exercise of it here was an unlawful taking of petitioner's property for a public use in violation of the Fifth Amendment and was improper without a public hearing and findings as to the efficient utilization of the navigable airspace. Petitioner requests an order either (1) dismissing this petition on the ground that the Determination cannot operate in any way to prejudice or impair the petitioner's use of its property; or (2) an order setting aside the Determination; or (3) an order setting aside the denial of the petition for a public hearing and directing the Administrator

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<sup>4/</sup> The petition sought review of "certain orders" issued by or under the authority of the Administrator. It refers thereafter to the "Determination of Hazard to Air Navigation," and to the denial of the petition for public hearing, which allegedly made the Determination final. In the jurisdictional statement in its brief, Petitioner states that this appeal is "to review a Determination of Hazard to Air Navigation" (Pet. Br. 7).

to make appropriate findings on the efficient utilization of the navigable airspace in light of the public interests served by the proposed power lines and the airport (J.A. 30-31).<sup>5/</sup>

#### STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Aviation Act and of the FAA Rules are set forth in the appendix to petitioner's brief.

#### SUMMARY OF ARGUMENT

A. The Federal Aviation Act of 1958 confers upon the Administrator of the Federal Aviation Agency broad powers to provide for safety in air navigation including a specific power to require notice of construction or alteration of structures affecting air safety. In the exercise of these powers, the Administrator promulgated Part 626 of the FAA rules which requires that notice be given of the construction or alteration of certain structures which may affect air navigation;

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<sup>5/</sup> On March 27, 1963, Pepco and Intervenor in this case entered into a consent decree which settled a case brought by Pepco against the latter in the circuit court for Prince Georges County, Maryland, a Maryland state court for a declaratory judgment that Pepco had the right to construct and maintain the proposed power lines. Pepco also asked the court to enjoin the airport operators from permitting aircraft to fly over transmission lines so as to endanger the lines. Under the terms of the consent decree, Pepco may lawfully construct and maintain the power lines; and defendants Rodenhauers may continue operating the airport, although they may not invite or permit aircraft to fly over the right of way so as to endanger the power line. The consent decree sought to preserve the rights in this suit by providing that "[n]othing contained herein shall be deemed to affect in any way any rights or duties which may rest on the parties with respect to the use of the navigable airspace, under and by virtue of the provisions of the Federal Aviation Act of 1958 . . . ." This decree is set forth in the appendix to this brief.

establishes criteria for determining preliminarily when such structures will be a hazard to air navigation; and provides for aeronautical studies and hearings to make a final determination. The FAA procedures serve air safety by providing a forum in which conflicts between aeronautical and non-aeronautical interests may be resolved by compromise or accommodation. The FAA determination is a declaration that the structure is not compatible with air navigation safety requirements but does not purport to prohibit the erection or alteration of the structure. This declaration serves air safety since it may be utilized by the FCC, local zoning and other bodies which have authority to license construction.

B. Since the determination does not prohibit the erection of Pepco's power lines, it may undertake the construction without being subject to civil or criminal liability under the Act. Because the determination does not have a direct impact on the legal rights of the petitioner, this Court is without jurisdiction to review the Administrator's determination. The possibility of some speculative future litigation involving the impact of petitioner's power lines on air navigation does not afford a sufficient basis upon which this Court may exercise its review powers.

C. If the Court reaches these questions, the determination is clearly a lawful implementation of the Administrator's powers to promote safety, and it does not involve a taking of property or require a hearing on the respective merits of the competing land uses.

## ARGUMENT

The Federal Aviation Administrator made a "determination" that petitioner Pepco's proposed power lines constitute "a hazard to air navigation" at the intervenors' Freeway Airport, but made no order purporting to prohibit or impair Pepco's construction or use of the lines. A principal basis asserted for review here is Pepco's "doubt" as to the effect of the FAA determination. We shall show, by analysis of the Act and regulations, that an FAA determination, like the one here, implements the safety objectives of the Act, but does not purport to adjudicate the right to construct a proposed structure and that the determination is not reviewable.

- A. An FAA determination that a proposed structure will be an air hazard is a declaration that incompatibility exists between the structure and aeronautical activity, but does not itself prohibit or limit either use.

Under the Federal Aviation Act of 1958, the Administrator is vested with broad powers to foster air safety including the regulation of "the use of the navigable airspace under such terms, conditions and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace" (Section 307(a), 49 U.S.C. 1348(a)).<sup>6/</sup> The existence of tall structures such as power lines, oil

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<sup>6/</sup> See also the Act's declaration of general policy to be considered by the Administrator, Section 103, 49 U.S.C. 1303; the provisions for development planning, Section 312, 49 U.S.C. 1353; and for safety regulation and certification of aircraft, airmen, air carriers, air navigation facilities and air agencies, Section 307(b), (c), 601-609, 49 U.S.C. 1348(b), (c), 1421-1429.

drilling derricks, radio and television antenna towers, and buildings present obvious hazards for air navigation. Aside from the general safety provisions, the problem of tall structures is specifically dealt with in Section 1101, 49 U.S.C. 1501, which states that, "[t]he Administrator shall, by rules and regulations, or by order where necessary, require all persons to give adequate public notice, in the form and manner prescribed by the Administrator, of the construction or alteration, or of the proposed construction or alteration, of any structure where notice will promote safety in air commerce." And the Administrator has general power to issue such regulations and orders, and conduct such investigations "as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act." (Section 313(a), 49 U.S.C. 1354(a)).

2. Pursuant to these statutory provisions, the Administrator in 1961 promulgated Part 626 of the FAA regulations (14 CFR), under which the proceedings below took place. The expressed purposes of the regulations are to require "adequate public notice of the proposed construction or alteration of any structure where notice will promote safety in air commerce"; to establish criteria for determining when structures constitute "hazards to air navigation"; and to provide for aeronautical studies and public hearings in which a proposed structure may be evaluated in light of those criteria to determine its effect "upon the safety of aircraft in flight and the efficient utilization of

airspace" (14 CFR 626.1(b)).<sup>7/</sup>

The FAA procedures, illustrated by the present case, Statement supra, are set forth in detail in Part 626. Notice must be given to the FAA of the proposed construction and alteration of certain structures, depending upon their height and proximity to airports (14 CFR 626.9, 626.10). On the basis of this notice the FAA considers whether the proposed structure exceeds the established hazard criteria; and, if so, the FAA makes a "preliminary determination" that the structure would be a "hazard to air navigation." An "aeronautical study" may be then undertaken by the FAA, on its own motion or upon the request of the construction sponsor, to determine whether, notwithstanding violation of the criteria, the proposal might be deemed not to constitute a hazard to air navigation (14 CFR 626.11 - 626.13).<sup>8/</sup>

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<sup>7/</sup> Another purpose is to establish "antenna farms," in order to concentrate antenna towers in specific areas, with the cooperation of the FCC (14 CFR 626.1(b)(5), 626.75 - 626.76).

Prior to the adoption of the Part 626, the governing regulations under the Civil Aeronautics Act required the giving of notice to the CAA of proposed construction, but did not provide for determinations of hazard to air navigation (14 CFR (1949 ed.) 625 et seq.).

<sup>8/</sup> Sections 626.12 and 626.13 set out the criteria for determining when a proposed structure, for which notice was required, constitutes a hazard to air navigation. For example, structures are considered hazards to air navigation if they are above 500 feet high, above 200 feet in certain FAA control zones or airways, or extend into certain prescribed "airport imaginary surfaces" meant to assure safe landing and approach patterns.

In the instant case, the preliminary determination of hazard to air navigation was made on the ground that the power lines would extend into certain of the airport imaginary surfaces set out in 626.13 (J.A. 4).

When an "aeronautical study" is initiated, notification is given the construction sponsor and other interested persons, from whom comments pertaining to the proposal are solicited (14 CFR 626.32(a)). If the FAA staff finds substantial aeronautical objection to the proposal either from its own analysis or from the comments filed by interested persons, an informal meeting is held in the FAA regional office. "In addition to the evaluation of the effect of the proposed construction on air navigation, the purposes of such a meeting are to explore the aeronautical objections to the proposal, to attempt to develop recommendations for adjustments in aviation requirements which would accommodate the proposed construction, and to examine possible modification of the proposed construction, including revisions of the proposal which would eliminate the violation of criteria" (14 CFR 626.32(c)(1)). A summary of the informal hearing and recommended conclusions as to the effect of the proposal upon the use of the navigable airspace, are forwarded to the Obstruction Evaluation Branch of the FAA, which evaluates the proposal with respect to "its effect upon the safe and efficient utilization of airspace by aircraft, and issue[s] a determination as to whether the proposed construction would be a hazard to air navigation" (14 CFR 626.33(a)).

The sponsor of the construction, or any person objecting to it, may then petition for a public hearing to obtain "a formal decision of the Administrator." Such hearing will be granted if the Administrator finds

that the petition "has adequate foundation" (14 CFR 626.34). The rules provide for presentation of evidence before an FAA employee designated as presiding officer. After the parties submit recommendations, the Administrator will review the record and other available relevant evidence, and make his determination, entering an appropriate order (14 CFR 626.50 - 626.64).<sup>9/</sup>

3. The Part 626 proceedings seek to implement the statutory safety provisions in specific limited ways. Notice of proposed structures makes possible proper charting on maps, a function envisaged by Section 1101 of the Act. The Administrator expanded the procedure beyond the requirement of notice in order to carry out his general responsibility for fostering air safety, e.g., Section 307(a).

By establishing air hazard criteria and providing for aeronautical studies and hearings, the Administrator has chosen to play an active part in accommodating proposed construction and aeronautical needs. The Administrator's purpose is to focus attention upon aeronautical needs and hazards. His determination of "hazard to air navigation" means that there is an incompatibility between the proposed structure and existing aeronautical activity. The determination does not itself prohibit or limit either the construction or air navigation. However, by means of the informal and formal proceedings under Part 626, the

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<sup>9/</sup> The Administrator is "not confined" to the transcript of the hearing (14 CFR 626.63). The regulations state that the hearing is "a fact-finding procedure" and hence is "non-adversary" and not subject to the Administrative Procedure Act (14 CFR 626.51).

Administrator has provided a forum for possible resolution of differences and accommodation of the competing air and ground interests by compromise and "moral persuasion."<sup>10/</sup>

This objective is made explicit in the regulations governing aeronautical studies. The FAA staff is directed to seek "adjustments in aviation requirements which would accommodate the proposed construction" (for example, a modification in flight patterns); and also, "to examine possible modification of the proposed construction, including revisions of the proposal which would eliminate the violation of criteria" (14 CFR 626.32(c)(1)). As a matter of fact, nearly every study thus far initiated has ended with such accommodations. While the regulations also provide for a public hearing to formalize the agency determination, this does not contemplate licensing or prohibitory orders. The regulations provide that the hearing is "non-adversary"; it is a means of "fact-finding" employed to assist the Administrator in his activities, not a basis for adjudicating private rights under the Administrative Procedure Act.

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<sup>10/</sup> See Hearings on "Review of the Federal Aviation Act," Aviation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2nd Sess., Part 2, p. 602 (FAA Director of the Bureau of Air Traffic Management, and the General Counsel).

Pepco (Pet. Br. 10, 17) cites references in the regulations' preamble to the "effect upon diverse non-aviation interests," as indicating an FAA intent to adjudicate between competing land uses. But this can better be explained as referring to the concern of non-aviation interests about the burdensome procedures themselves. Thus, the mere requirement of giving thirty days notice of construction, 626.10(a), would have an adverse effect on non-aviation interests that need to make rapid, emergency changes in ground structures such as oil drilling derrick operators and railroad companies.

While the Administrator does not purport to choose between the competing aeronautical and non-aeronautical uses, the superiority of one use over another may be resolved by application of local law. In conflicts arising between airports and adjacent landowners, traditional principles of equity law have provided the basis for judicial decision,<sup>11/</sup> and zoning boards and licensing authorities may control or limit either airport or other construction. And, where public airports are involved, the power of eminent domain is generally available to the airport to take whatever land or easements are required for safe and efficient operation. The FAA determination of hazard is useful to these bodies in showing the extent of the conflict between the aeronautical and non-aeronautical uses.<sup>12/</sup>

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11/ Roosevelt Field v. Town of North Hempstead, 88 F. Supp. 177 (E.D. N.Y.) (water tower could not be enjoined); Guith v. Consumer's Power Co., 36 F. Supp. 21 (E.D. Mich.), and Capitol Airways, Inc. v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N.E. 2d 776 (erection of power lines could not be enjoined); Reaver v. Martin Theaters of Florida, 52 So. 2d 682 (Fla. S. Ct.) (drive-in airport not enjoined); Air Terminal Properties v. New York, 172 Misc. 945, 16 N.Y.S. 2d 629 (planting of trees on highway near airport by city not enjoined). However, the courts have enjoined the erection of objects that have no utility or are spite structures. Commonwealth ex rel. Schnader v. Von Bestecki, 30 Pa. D & C 137, [1937] US Av 1; Iowa City v. Tucker [1936] US Av 10 (Iowa Dist. Ct.); Liles v. Jarnigan [1950] US Av 90 (Tenn. Ch. Ct.).

12/ Part 626 is not unique in this respect. For example, Section 309 of the Act requires notice to the FAA of construction or alteration of any airport (even though no federal funds are involved). Under Part 625 of the regulations, the Administrator has provided for the making of a determination as to the effect of the proposal "upon the safe, efficient use of airspace." This determination does not have any binding effect of itself but is to be furnished to the airport proponent, state aviation officials and other interested persons, 14 CFR 625.6(b), (c).

The FAA determination may also be utilized in a similar way by the Federal Communications Commission. The Administrator may find that a proposed radio antenna tower would interfere with air navigation, but his regulations expressly disclaim any intent to impair the Commission's authority to permit construction of such towers.<sup>13/</sup> The FCC, in turn, considers the FAA determinations as a ground for then taking "such further action as might be appropriate" (47 CFR 17.4). Among other conditions, the Commission may require the painting or illumination of an antenna that would be a menace to navigation (Section 303(q)) of the Federal Communications Act, 47 U.S.C. 303(q) and has detailed regulations on that subject, 47 CFR 17.21 - 17.45. The Commission may also refuse to issue a permit for the construction of an antenna that is hazardous to air navigation (Simmons v. Federal Communications Commission, 79 U.S. App. D.C. 264, 145 F. 2d 578).

**B. The FAA Determination Below is not a Reviewable Order**

We have shown that a "Determination of Hazard to Air Navigation" under Part 626 is a finding made by the Administrator to promote air safety, and has no mandatory effects upon any party. By its terms, as already noted, the determination here does not order Pepco to do or refrain from doing any act. Nor does the determination otherwise purport to alter, change, or declare Pepco's legal rights or liabilities. It merely finds that the proposed power line would be hazardous to aviation and would have an adverse effect upon Freeway Airport.

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<sup>13/</sup> A note to Section 626.50 of Part 626 states: "Any findings entered hereunder are without prejudice to the jurisdiction of the Federal Communications Commission to grant or deny applications for construction permits under the Communications Act of 1934, as amended."

Thus, we think it clear that Pepco may build the transmission lines without subjecting itself to the possibility of a civil penalty action under Section 901, 49 U.S.C. 1472, or to an enforcement proceeding under Section 1007, 49 U.S.C. 1487, for violation of an order of the Administrator.<sup>14/</sup> We submit, therefore, that the determination is not a reviewable order within this Court's jurisdiction under Section 1006 of the Act, 49 U.S.C. 1486.

1. A fundamental principle of judicial review of agency action is that resort may be had to the courts only when agency orders "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process" (C & S Airlines, Inc. v. Waterman Steamship Corp., 333 U.S.<sup>103</sup> 95, 112-113). As Judge Washington succinctly put it in a leading opinion of this Court, "In all cases held reviewable, something was happening to the complainant. Either someone was doing something to him or he was placed under an obligation to do something." California Oregon Power Co. v. Federal Power Commission, 99 U.S. App. D.C. 263, 270, 239 F. 2d 426, 436.

Even if the Administrator, under the Act and regulations, could take action against a proposed structure, he has not sought to do so. This Court has repeatedly held that judicial power does not extend to reviewing mere administrative findings or opinions upon which no

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<sup>14/</sup> An agency order must be a specific command to result in such penalties. Cf. National Labor Relations Board v. Express Publishing Co., 312 U.S. 426, 433; Odom v. Thompson, 85 F. Supp. 477 (N.D. Ala.).

coercive order is based. Continental Bank & Trust Co. v. Martin, 112 U.S. App. D.C. 354, 303 F. 2d 214; California Oregon Power Co. v. Federal Power Commission, 99 U.S. App. D.C. 263, 239 F. 2d 426; Helco Products Co. v. McNutt, 78 U.S. App. D.C. 71, 137 F. 2d 681; John P. Agnew & Co. v. Hooze, 69 U.S. App. D.C. 116, 99 F. 2d 349; See also Carolina Aluminum Co. v. Federal Power Commission, 97 F. 2d 435 (C.A. 4). See also United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, in which the Supreme Court held unreviewable an ICC determination which fixed the value of the appellee's property, <sup>15/</sup> but which took no action against the carrier.

2. Petitioner Pepco attempts to bring the Administrator's action within the ambit of judicial review power by arguing that "[e]ven if the Determination is not intended to have any adverse effect on Pepco, nevertheless, it is only realistic to recognize that at some time in the future some court might give weight to the Determination adverse to Pepco in an action, for example, brought to enjoin Pepco from constructing or maintaining its proposed transmission facilities, or one brought against Pepco to recover for damages suffered by a

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<sup>15/</sup> The Court there stated (273 U.S. at 309-310):

The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing anything; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil, or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research.

flyer as a result of his airplane coming into contact with Pepco's facilities [footnote omitted], or one brought by Pepco for damages suffered by Pepco as a result of an airplane coming into contact with its facilities" (Pet. 18). Jurisdiction to review the present determination cannot rest upon the speculative possibility of future proceedings before a court or other body, in which the hazards presented by the power lines might be litigated.

The prospect of subsequent litigation involving the power lines does not give the Administrator's determination the "immediate and practical impact"<sup>16/</sup> required for review. As the Supreme Court ruled in the leading decision of Eccles v. Peoples Bank, 333 U.S. 426, 432:

The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determination. Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing.

Similarly, in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 619 the Supreme Court refused to review a finding by the Federal Power Commission that past rates of Hope were unlawful, made only for the benefit of a state agency which had a consumer's fund to dispose of. The Court held that the finding was "the exercise solely of the function of investigation" and would adversely affect the complainant "only on the contingency of future administrative action" by other bodies. See also C. & S. Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. <sup>103</sup>95, 112-113. The same point was made in

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<sup>16/</sup> Frozen Food Express v. United States, 351 U.S. 40, 44.

Wolff v. Benson, 103 U.S. App. D.C. 334, 258 F. 2d 428, when this Court refused to review the validity of an agricultural marketing agreement which might have provided the basis for action by the Tariff Commission and the President injurious to the complainants.

3. Pepco maintains, however, that the Determination should nonetheless be reviewable because otherwise it would be denied "any opportunity to attack the Determination as unauthorized or lacking in procedural due process, since, it having become 'final,' it would not be open to collateral attack" (Pet.Br. 19). But since Pepco does not contest the fact that the construction of its power lines would in fact violate the criteria established by the regulations, the subject matter of the FAA proceeding below would not be at issue in any subsequent case. It follows, therefore, that denial of review here will in no way prejudice petitioner's rights in any future litigation.

Apprehension of adverse consequences is apparently based on certain provisions of the Federal Aviation Act of 1958 (Pet. Br. 16). Section 101(24), 41 U.S.C. 1301(24), defines "Navigable airspace" to mean "airspace above the minimum altitudes of flight prescribed by regulations . . . and shall include airspace needed to insure safety in take-off and landing of aircraft," Section 104, 49 U.S.C. 1304, declares "a public right of transit through the navigable airspace" to exist in behalf of "any citizen." And Section 307(a), 49 U.S.C. 1348(a), vests the Administrator with power to "assign by

rule, regulation, or order the use of the navigable airspace . . . in order to insure the safety of aircraft, and the efficient utilization of such aircraft." Apparently Petitioner fears that in a future case involving the power lines, a court might rule adversely to petitioner on the ground that the power lines constituted a trespass upon the "navigable airspace." The Administrator's "determination" did not purport to construe these statutory provisions or pass upon the respective rights of the airport and Pepco against each other. Certainly a court in any future case will not be bound by the "determination" in construing the Federal Aviation Act and resolving the issues indicated by petitioner.

The only case which we have been able to discover which treats the effect given an official opinion that a structure would constitute a hazard to air navigation substantiates our view as to how a court would treat such an opinion. In Roosevelt Field v. Town of North Hempstead, 88 F. Supp. 177 (E.D. N.Y.), decided in 1950, plaintiff, owner and operator of an airfield, sought an injunction against the maintenance of a village water-supply tower on the theories that the tower was considered an aeronautical hazard by the Civil Aeronautics Administrator and that it was both a public and a private nuisance. <sup>17/</sup>

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<sup>17/</sup> In an earlier phase of this litigation, defendant moved to strike references in the complaint to the C.A.A. designation of hazard to air navigation and to dismiss the complaint for lack of federal jurisdiction. Both motions were denied 84 F. Supp. 456 (E.D. N.Y.). The attack on the complaint was grounded on the premise that no federal statute conferred a right of action for violation of the CAA regulations. The court held that a federal question was presented by an allegation of interference with air navigation, and that a claim upon which relief may be granted may be based upon a statute or regulations even though by their terms they do not create such a right.

The water tower protruded 38 feet above the minimum height established by the Civil Aeronautics Authority for maneuvering for landing and take-off. The court noted that the structure was regarded by the CAA as an aeronautical hazard (88 F. Supp. at 182, 183), but also noted that "[t]here was no regulation, ruling or standard adopted by the CAA which either in terms or by implication purported to prohibit the erection of this water tower" (at 182).<sup>18/</sup> One of plaintiff's theories in that case was similar to that which Petitioner suggests might eventuate in its injury:

The plaintiff's theory is thus stated in its brief: "No 'taking' of defendants' property in the super-adjacent air is involved in this action, for the reason that their use of the upper reaches thereof had already been taken by the exercise of such police powers; rather, there has been a 'taking' by the defendants of property in the public domain through which the plaintiffs have 'freedom of transit.' (at 182).

The court found no difficulty in rejecting this theory on the ground that neither the applicable statute nor regulation purported to "take" the airspace for public use above the established minimum altitude in the "exercise of the police power."<sup>19/</sup> Consequently, plaintiff was held to have no property rights in the airspace over

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<sup>18/</sup> Correspondence from the CAA to the defendants disclaimed the authority to prohibit the construction of the tower (88 F. Supp. 177).

<sup>19/</sup> While the CAA regulations did not provide for determinations of hazard to air navigation, but only required the giving of notice of proposed construction (fn. 7, *supra*), there was no doubt in that case that the agency considered the tower hazardous to air navigation.

defendants' land.<sup>20/</sup> On the nuisance theory advanced by plaintiff the court weighed the equities and denied the injunction.

Accordingly, the possibility of future litigation involving the respective rights of petitioner and intervenors does not provide a basis for review of the Administrator's determination.

C. The Determination is Valid

Our interpretation of the determination in the context of the Act and regulations has shown that the determination is not a reviewable order. This discussion also clearly answers the other issues sought to be raised by petitioner--which need not be reached by this Court--concerning the validity of the determination.

Petitioner does not contest the factual determination that its power lines will be a hazard to air navigation, in the sense that their construction and use will be incompatible with safe and efficient use of the Freeway Airport. The making of such a determination is within the statutory power of the Administrator to promote air safety. The determination has no coercive or binding adjudicative effect, so there is clearly no possibility of a taking which would require compensation. And since the Administrator does not purport to adjudicate

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<sup>20/</sup> Since this decision the definition of navigable airspace was modified by the Federal Aviation Act of 1958 to include "airspace needed to insure safety in take-off and landing of aircraft" Section 101(24), 49 U.S.C. 1301. This is the basis for petitioner's apprehension of a future ruling against it.

between the airport and the power lines, there is no reason for a hearing upon the public interest in the respective uses.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed.

Respectfully submitted.

WILLIAM H. ORRICK, JR.,  
Assistant Attorney General.

LIONEL KESTENBAUM,  
I. DANIEL STEWART, JR.,  
Attorneys.

AUGUST 1963.

**APPENDIX**

**Equity No. B-9576**

**IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND**

**POTOMAC ELECTRIC POWER COMPANY, Plaintiff,**

**v.**

**IRVIN R. RODENHAUSER (also known as Irving R. Rodenhauser) and FRANCES M. RODENHAUSER, his wife, Defendants.**

**DECREE**

The above matter having come before the Court for determination, and all parties to the proceeding having been heard and having indicated their consent to the passage of the following Decree, it is, this 27th day of March, 1963, by the Circuit Court for Prince George's County, Maryland,

**ORDERED, DECLARED AND ADJUDGED:**

1. That Plaintiff Potomac Electric Power Company, its successors and assigns, may lawfully construct, operate and maintain on its 250 foot wide strip of land described in paragraph 4 of the Bill of Complaint herein, electric power and energy transmission facilities, such as towers, poles, structures, wires, cables and conduits; and

2. That Defendants Irvin R. Rodenhauser and Frances M. Rodenhauser, their heirs, executors, administrators, successors and assigns, may lawfully operate an airport on their property described in paragraph 5 of the Bill of Complaint herein, provided, however, that they may not operate said airport in such a manner as to invite or permit aircraft,

in the course of their use of such airport, to fly over Plaintiff's said strip of land in such manners and at such altitudes as to interfere with Plaintiff's usage of its said strip of land and the superjacent air space for its said electric transmission facilities, or as to expose such facilities to hazard or danger.

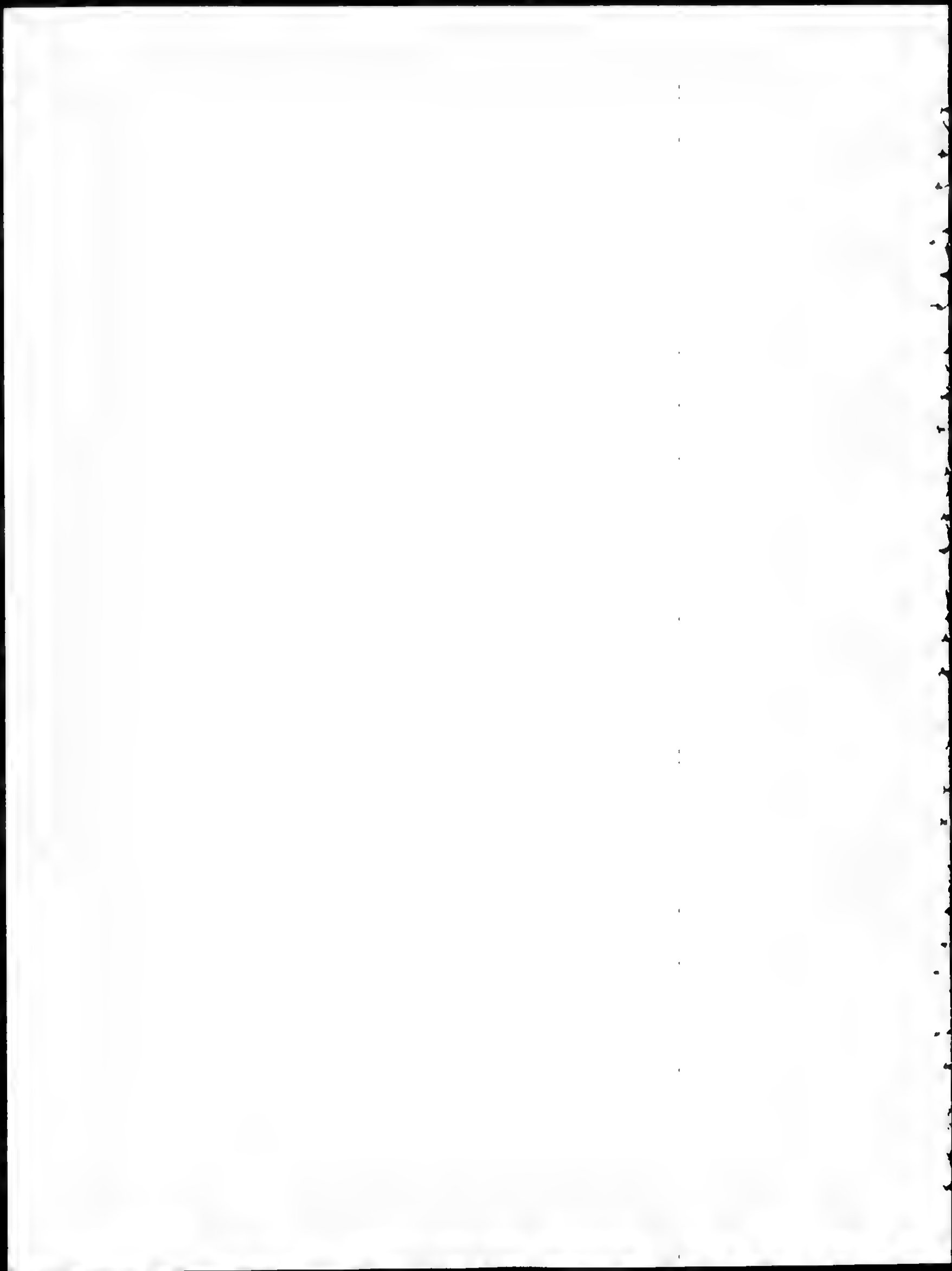
3. Nothing contained herein shall be deemed to affect in any way any rights or duties which may rest in the parties with respect to the use of the navigable airspace, under and by virtue of the provisions of the Federal Aviation Act of 1958, or its predecessor, or with respect to the use of their respective properties under the applicable zoning ordinance, or uses thereunder, of the Maryland-Washington Regional District.

/s/ Roscoe H. Parker  
JUDGE

Agreed:

\_\_\_\_\_  
William J. McCarthy,  
Attorney for Plaintiff

\_\_\_\_\_  
Paul M. Nussbaum,  
Attorney for Defendants.



BRIEF FOR RESPONDENT

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,706

POTOMAC ELECTRIC POWER COMPANY, PETITIONER

v.

N. E. HALABY, ADMINISTRATOR OF THE  
FEDERAL AVIATION AGENCY, RESPONDENT

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ON PETITION FOR REVIEW OF AN ORDER OF THE  
ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY

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United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA

FILED AUG 24 1964

*Matthew J. Wilson*  
CLERK

WILLIAM H. ORRICK, JR.,  
Assistant Attorney General,

LIONEL KESTENBAUM,  
I. DANIEL STEWART, JR.,  
Attorneys,

Department of Justice,  
Washington, D.C. 20530.

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### COUNTER-STATEMENT OF QUESTIONS PRESENTED

The parties have stipulated that the following issues are presented by this case (J.A. 32):

1. Whether this Court has jurisdiction to review the determination by the Federal Aviation Administrator that the proposed construction of power lines by Potomac Electric Power Company on property abutting the Freeway Airport would constitute a hazard to air navigation.
2. Whether the Administrator has statutory authority (a) to make a determination that a proposed structure would be a hazard to air navigation, and (b) to do so without providing for just compensation.
3. Assuming that the Administrator has such authority, whether it may be exercised without affording the petitioner an opportunity to present evidence as to the respective public interests involved in the airport and in petitioner's power lines, and without the Administrator making findings in the light thereof as to the efficient utilization of the navigable airspace.

## INDEX

	Page
Counter-statement of questions presented.....	1
Counter-statement of the case.....	1
Statute and regulations involved.....	6
Summary of argument.....	6
Argument:	
A. An FAA determination that a proposed structure will be an air hazard is a declaration that incompatibility exists between the structure and aeronautical activity but does not itself prohibit or limit either use.....	8
B. The FAA determination below is not a reviewable order.....	15
C. The determination is valid.....	22
Conclusion.....	23
Appendix.....	24

## CITATIONS

### Cases:

<u>Air Terminal Properties v. New York</u> , 172 Misc. 945, 16 N.Y.S. 2d 629.....	14
<u>C &amp; S Airlines, Inc. v. Waterman Steamship Corp.</u> , 333 U.S. 103.....	16, 18
<u>California Oregon Power Co. v. Federal Power Commission</u> , 99 U.S. App. D.C. 263, 239 F. 2d 426.....	16, 17
<u>Capitol Airways, Inc. v. Indianapolis Power &amp; Light Co.</u> , 215 Ind. 462, 18 N.E. 2d 776.....	14
<u>Carolina Aluminum Co. v. Federal Power Commission</u> , 97 F. 2d 435.....	17
<u>Commonwealth ex rel. Schnader v. Von Bestecki</u> , 30 Pa. D & C 137, [1937] 75 A. 1.....	14
<u>Continental Bank &amp; Trust Co. v. Martin</u> , 112 U.S. App. D.C. 354, 303 F. 2d 214.....	17
<u>Eccles v. Peoples Bank</u> , 333 U.S. 426.....	18
<u>Federal Power Commission v. Hope Natural Gas Co.</u> , 320 U.S. 591.....	18
<u>Frozen Food Express v. United States</u> , 351 U.S. 40.....	14
<u>Guith v. Consumer's Power Co.</u> , 36 F. Supp. 21.....	14
<u>John P. Agnew &amp; Co. v. Hooze</u> , 69 U.S. App. D.C. 116, 99 F. 2d 349.....	17
<u>Helco Products Co. v. McNutt</u> , 78 U.S. App. D.C. 71, 137 F. 2d 681.....	17
<u>Iowa City v. Tucker</u> , [1936] US App 10.....	14
<u>Liles v. Jarnigan</u> , [1950] US App 90.....	14

	Page
<b>Cases: - Continued</b>	
<u>National Labor Relations Board v. Express Publishing Co.</u> , 312 U.S. 426.....	16
<u>Odom v. Thompson</u> , 85 F. Supp. 477.....	16
<u>Reaver v. Martin Theaters of Florida</u> , 52 So. 2d 682.....	14
<u>Roosevelt Field v. Town of North Hempstead</u> , 84 F. Supp. 456.....	20
<u>Roosevelt Field v. Town of North Hempstead</u> , 88 F. Supp. 177.....	14, 20
<u>Simmons v. Federal Communications Commission</u> , 79 U.S App. D.C. 264, 145 F. 2d 578.....	15
<u>United States v. Los Angeles &amp; Salt Lake R. Co.</u> , 273 U.S. 299.....	17

**Statutes:**

**Federal Aviation Act:**

Section 101(24), 41 U.S.C. 1301(24).....	19, 22
Section 103, 49 U.S.C. 1303.....	8
Section 104, 49 U.S.C. 1304.....	19
Section 307(a), 49 U.S.C. 1348(a).....	8, 12, 19
Section 307(b), (c), 49 U.S.C. 1348(b), (c).....	8
Section 312, 49 U.S.C. 1353.....	8
Section 313(a), 49 U.S.C. 1354(a).....	9
Section 901, 49 U.S.C. 1472.....	16
Section 1006, 49 U.S.C. 1486.....	16
Section 1007, 49 U.S.C. 1487.....	16

**Federal Communications Act:** Section 303(q), 47 U.S.C. 303(q).15

**Regulations:**

**Federal Aviation Agency Rules:**

**Part 625, 14 CFR:**

Section 625.6(b), (c).....	14
----------------------------	----

**Part 626, 14 CFR:**

Section 626.1(b)(5).....	10
Section 626.9.....	3, 10
Section 626.10.....	3, 10
Section 626.11.....	3, 10
Section 626.12.....	10
Section 626.13.....	3, 10
Section 626.30.....	3
Section 626.32.....	11, 13
Section 626.33.....	11
Section 626.34.....	4, 12
Section 626.50.....	12, 15
Section 626.51.....	12
Section 626.63.....	12
Section 626.64.....	3, 12

	Page
<b>Regulations: - Continued</b>	
Section 626.75.....	10
Section 626.76.....	10
Part 77 effective December 12, 1962, 27 F.R. 10357.....	3
<b>Federal Communications Commission Rules:</b>	
Part 17, 47 CFR:	
Section 17.4.....	15
Section 17.21 - 17.45.....	15
<b>Miscellaneous:</b>	
Hearings on "Review of the Federal Aviation Act," Aviation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2nd Sess., Part 2.....	13

### COUNTER-STATEMENT OF THE CASE

The basic facts in this case are not in dispute.

Freeway Airport is located near Mitchellville, Maryland, and has been in operation since 1942 or 1946 (J.A. 12, 17).<sup>1/</sup> It is owned by Irvin R. Rodenhauser and his wife Frances M. Rodenhauser, who are intervenors in this case. In 1959 the State of Maryland issued a commercial license for the operation of the airport (J.A. 1, 17). About twenty planes, which are used for pleasure, sport, and business, are now based there (J.A. 17, 22). The airport has four runways as shown on the map at J.A. 9--a north-south runway 3,400 feet long; an east-west runway 1,800 feet long; a northeast-southwest runway 1,800 feet long; and a northeast-southeast runway 2,000 feet long (J.A. 20).

Petitioner, Potomac Electric Power Company (Pepco), is a public utility that supplies electricity to the District of Columbia and parts of the states of Virginia and Maryland (J.A. 19). In 1956 Pepco acquired an option on a site at Chalk Point on the Patuxent River, Prince Georges County, Maryland, for the purpose of building a steam-electric generating station (J.A. 20, 21). The first generating unit at the new station is scheduled to go into operation in the spring of 1964, and a second in the spring of 1965 (J.A. 21).

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<sup>1/</sup> "J.A." refers to the joint appendix which is printed in the same volume as petitioner's brief.

To connect the Chalk Point station with its distribution system, Pepco planned to build transmission lines from Chalk Point to its Burtonsville substation, which is also located in Maryland (J.A. 21). The prospective transmission line route was laid out on the basis of aerial photographs and was largely determined by mid-1958 (J.A. 21). Thereafter Pepco bought a 250-foot right-of-way between Chalk Point and Burtonsville, a portion of which abuts directly on the Freeway Airport property. Pepco alleges that the aerial photographs did not reveal the existence of the airport (J.A. 21).<sup>2/</sup>

Pepco's intended power lines will be 230,000 volt, double circuit transmission lines which will be supported by steel towers 125 feet high, spaced at approximately 800 feet intervals (J.A. 2, 22). They will run parallel to the airport's western boundary and will be located a few feet from the end of two of the four runways. The extended center line of the east-west runway will intersect the power lines at about a 90 degree angle, and the extended center line of the northwest-southeast runway will intersect the lines at about a 45 degree angle (J.A. 9). If the transmission lines are constructed according to plans, their proximity to the airport will render these two runways unusable (J.A. 18).

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<sup>2/</sup> At the time of the aerial survey, it appears that none of the runways at Freeway had been paved (see J.A. 1).

In compliance with Part 626 of the Federal Aviation Agency Rules, 14 CFR (Revised as of January 1, 1962) Section 626.9, 626.10<sup>3/</sup> Pepco gave notice on Form FAA-117 of its plans to construct the Chalk Point--Burtonsville power line (J.A. 2).

On February 16, 1962, the Chief of the New York Regional Airspace Utilization Branch of the Federal Aviation Agency, informed Pepco by letter that on the basis of FAA-117 and its attachments a "preliminary determination" had been made that the proposed power lines would constitute a "hazard to air navigation" (J.A. 4), under 14 CFR 626.11 - 626.13. The letter stated that the proposed power line would interfere with the runway approach surfaces of all four runways, the degree of violation of FAA criteria varying from approximately 63 feet to 125 feet above ground (*ibid.*). The letter suggested the possibility of relocating the lines and advised Pepco of its right to request an "aeronautical study" within thirty days, which petitioner duly requested (J.A. 6).

In accordance with the procedure prescribed by the FAA rules (14 CFR 626.30 - 626.64), an aeronautical study was initiated (J.A. 7). Comments were received as to the effect of Pepco's proposal on aeronautical activity from, among others, the Airline Owners and Pilots Association (J.A. 10); the United States Army (J.A. 11); and National Pilots Association (J.A. 11). An informal meeting, attended by FAA officials, Pepco,

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<sup>3/</sup> Part 626 has been amended and redesignated Part 77 effective as of December 12, 1962, 27 F.R. 10357 (1962), with no substantial changes pertinent to this case. In this brief, we refer to the regulations in effect during the proceedings below, i.e., Part 626 revised as of January 1, 1962.

and other interested parties, was held May 15, 1962 in the FAA offices at Jamaica, New York in which the proposal and comments made in response to the FAA circularization were reviewed. In a memorandum summarizing the proceedings of that meeting, it was pointed out that the proposed power lines would penetrate the approach surfaces of all four runways at the Freeway Airport; that two of the runways would be closed; and that approaches to and departures from one other runway would be seriously affected (J.A. 16-17).

Based upon the aeronautical study, the acting chief of the Obstruction Evaluation Branch of the FAA issued a document on October 19, 1962 entitled "Determination of Hazard to Air Navigation" which stated (J.A. 17-18, at 18):

Pursuant to the authority delegated to me by the Administrator (14 CFR 626.33) it is found that the proposed structure would have a substantial adverse effect upon aeronautical operations at the Freeway Airport and it is hereby determined that the proposed structure would be a hazard to air navigation.

Pepco filed a petition pursuant to Section 626.34 to obtain a public hearing and a formal decision by the Administrator on the proposed construction "in the light of the over-all public interest, the effect of the proposed construction upon the safety of aircraft and, even more importantly, upon the efficient utilization of the navigable airspace" (J.A. 19-23). In its petition Pepco complained that the "Determination of Hazard" made no findings with respect to the most efficient utilization of the airspace above its 250-foot right of way in the vicinity of the airport and that no consideration was

given to the public interest involved in Pepco's operation as a public utility (J.A. 23). The petition was denied February 1, 1963 because the ground asserted did not constitute "adequate foundation" for convening a hearing (J.A. 26-27).

Pepco filed a petition for review in this Court on March 16, 1963 (J.A. 27-31).<sup>4/</sup> The petition asserted (J.A. 29-30) that if the Determination of Hazard could operate in any way to prejudice petitioner's construction and use of its transmission lines or adversely affect the property rights therein, the Administrator lacked statutory authority to issue it. Petitioner further urged that if such authority existed the Administrator's exercise of it here was an unlawful taking of petitioner's property for a public use in violation of the Fifth Amendment and was improper without a public hearing and findings as to the efficient utilization of the navigable airspace. Petitioner requests an order either (1) dismissing this petition on the ground that the Determination cannot operate in any way to prejudice or impair the petitioner's use of its property; or (2) an order setting aside the Determination; or (3) an order setting aside the denial of the petition for a public hearing and directing the Administrator

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<sup>4/</sup> The petition sought review of "certain orders" issued by or under the authority of the Administrator. It refers thereafter to the "Determination of Hazard to Air Navigation," and to the denial of the petition for public hearing, which allegedly made the Determination final. In the jurisdictional statement in its brief, Petitioner states that this appeal is "to review a Determination of Hazard to Air Navigation" (Pet. Br. 7).

to make appropriate findings on the efficient utilization of the navigable airspace in light of the public interests served by the proposed power lines and the airport (J.A. 30-31).<sup>5/</sup>

#### STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Aviation Act and of the FAA Rules are set forth in the appendix to petitioner's brief.

#### SUMMARY OF ARGUMENT

A. The Federal Aviation Act of 1958 confers upon the Administrator of the Federal Aviation Agency broad powers to provide for safety in air navigation including a specific power to require notice of construction or alteration of structures affecting air safety. In the exercise of these powers, the Administrator promulgated Part 626 of the FAA rules which requires that notice be given of the construction or alteration of certain structures which may affect air navigation;

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<sup>5/</sup> On March 27, 1963, Pepco and Intervenor in this case entered into a consent decree which settled a case brought by Pepco against the latter in the circuit court for Prince Georges County, Maryland, a Maryland state court for a declaratory judgment that Pepco had the right to construct and maintain the proposed power lines. Pepco also asked the court to enjoin the airport operators from permitting aircraft to fly over transmission lines so as to endanger the lines. Under the terms of the consent decree, Pepco may lawfully construct and maintain the power lines; and defendants Rodenhauers may continue operating the airport, although they may not invite or permit aircraft to fly over the right of way so as to endanger the power line. The consent decree sought to preserve the rights in this suit by providing that "[n]othing contained herein shall be deemed to affect in any way any rights or duties which may rest on the parties with respect to the use of the navigable airspace, under and by virtue of the provisions of the Federal Aviation Act of 1958 . . . ." This decree is set forth in the appendix to this brief.

establishes criteria for determining preliminarily when such structures will be a hazard to air navigation; and provides for aeronautical studies and hearings to make a final determination. The FAA procedures serve air safety by providing a forum in which conflicts between aeronautical and non-aeronautical interests may be resolved by compromise or accommodation. The FAA determination is a declaration that the structure is not compatible with air navigation safety requirements but does not purport to prohibit the erection or alteration of the structure. This declaration serves air safety since it may be utilized by the FCC, local zoning and other bodies which have authority to license construction.

B. Since the determination does not prohibit the erection of Pepco's power lines, it may undertake the construction without being subject to civil or criminal liability under the Act. Because the determination does not have a direct impact on the legal rights of the petitioner, this Court is without jurisdiction to review the Administrator's determination. The possibility of some speculative future litigation involving the impact of petitioner's power lines on air navigation does not afford a sufficient basis upon which this Court may exercise its review powers.

C. If the Court reaches these questions, the determination is clearly a lawful implementation of the Administrator's powers to promote safety, and it does not involve a taking of property or require a hearing on the respective merits of the competing land uses.

#### ARGUMENT

The Federal Aviation Administrator made a "determination" that petitioner Pepco's proposed power lines constitute "a hazard to air navigation" at the intervenors' Freeway Airport, but made no order purporting to prohibit or impair Pepco's construction or use of the lines. A principal basis asserted for review here is Pepco's "doubt" as to the effect of the FAA determination. We shall show, by analysis of the Act and regulations, that an FAA determination, like the one here, implements the safety objectives of the Act, but does not purport to adjudicate the right to construct a proposed structure and that the determination is not reviewable.

- A. An FAA determination that a proposed structure will be an air hazard is a declaration that incompatibility exists between the structure and aeronautical activity, but does not itself prohibit or limit either use.

Under the Federal Aviation Act of 1958, the Administrator is vested with broad powers to foster air safety including the regulation of "the use of the navigable airspace under such terms, conditions and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace" (Section 307(a), 49 U.S.C. 1348(a)).<sup>6/</sup> The existence of tall structures such as power lines, oil

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<sup>6/</sup> See also the Act's declaration of general policy to be considered by the Administrator, Section 103, 49 U.S.C. 1303; the provisions for development planning, Section 312, 49 U.S.C. 1353; and for safety regulation and certification of aircraft, airmen, air carriers, air navigation facilities and air agencies, Section 307(b), (c), 601-609, 49 U.S.C. 1348(b), (c), 1421-1429.

drilling derricks, radio and television antenna towers, and buildings present obvious hazards for air navigation. Aside from the general safety provisions, the problem of tall structures is specifically dealt with in Section 1101, 49 U.S.C. 1501, which states that, "[t]he Administrator shall, by rules and regulations, or by order where necessary, require all persons to give adequate public notice, in the form and manner prescribed by the Administrator, of the construction or alteration, or of the proposed construction or alteration, of any structure where notice will promote safety in air commerce." And the Administrator has general power to issue such regulations and orders, and conduct such investigations "as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act." (Section 313(a), 49 U.S.C. 1354(a)).

2. Pursuant to these statutory provisions, the Administrator in 1961 promulgated Part 626 of the FAA regulations (14 CFR), under which the proceedings below took place. The expressed purposes of the regulations are to require "adequate public notice of the proposed construction or alteration of any structure where notice will promote safety in air commerce"; to establish criteria for determining when structures constitute "hazards to air navigation"; and to provide for aeronautical studies and public hearings in which a proposed structure may be evaluated in light of those criteria to determine its effect "upon the safety of aircraft in flight and the efficient utilization of

airspace" (14 CFR 626.1(b)).<sup>7/</sup>

The FAA procedures, illustrated by the present case, Statement supra, are set forth in detail in Part 626. Notice must be given to the FAA of the proposed construction and alteration of certain structures, depending upon their height and proximity to airports (14 CFR 626.9, 626.10). On the basis of this notice the FAA considers whether the proposed structure exceeds the established hazard criteria; and, if so, the FAA makes a "preliminary determination" that the structure would be a "hazard to air navigation." An "aeronautical study" may be then undertaken by the FAA, on its own motion or upon the request of the construction sponsor, to determine whether, notwithstanding violation of the criteria, the proposal might be deemed not to constitute a hazard to air navigation (14 CFR 626.11 - 626.13).<sup>8/</sup>

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<sup>7/</sup> Another purpose is to establish "antenna farms," in order to concentrate antenna towers in specific areas, with the cooperation of the FCC (14 CFR 626.1(b)(5), 626.75 - 626.76).

Prior to the adoption of the Part 626, the governing regulations under the Civil Aeronautics Act required the giving of notice to the CAA of proposed construction, but did not provide for determinations of hazard to air navigation (14 CFR (1949 ed.) 625 et seq.).

<sup>8/</sup> Sections 626.12 and 626.13 set out the criteria for determining when a proposed structure, for which notice was required, constitutes a hazard to air navigation. For example, structures are considered hazards to air navigation if they are above 500 feet high, above 200 feet in certain FAA control zones or airways, or extend into certain prescribed "airport imaginary surfaces" meant to assure safe landing and approach patterns.

In the instant case, the preliminary determination of hazard to air navigation was made on the ground that the power lines would extend into certain of the airport imaginary surfaces set out in 626.13 (J.A. 4).

When an "aeronautical study" is initiated, notification is given the construction sponsor and other interested persons, from whom comments pertaining to the proposal are solicited (14 CFR 626.32(a)). If the FAA staff finds substantial aeronautical objection to the proposal either from its own analysis or from the comments filed by interested persons, an informal meeting is held in the FAA regional office. "In addition to the evaluation of the effect of the proposed construction on air navigation, the purposes of such a meeting are to explore the aeronautical objections to the proposal, to attempt to develop recommendations for adjustments in aviation requirements which would accommodate the proposed construction, and to examine possible modification of the proposed construction, including revisions of the proposal which would eliminate the violation of criteria" (14 CFR 626.32(c)(1)). A summary of the informal hearing and recommended conclusions as to the effect of the proposal upon the use of the navigable airspace, are forwarded to the Obstruction Evaluation Branch of the FAA, which evaluates the proposal with respect to "its effect upon the safe and efficient utilization of airspace by aircraft, and issue[s] a determination as to whether the proposed construction would be a hazard to air navigation" (14 CFR 626.33(a)).

The sponsor of the construction, or any person objecting to it, may then petition for a public hearing to obtain "a formal decision of the Administrator." Such hearing will be granted if the Administrator finds

that the petition "has adequate foundation" (14 CFR 626.34). The rules provide for presentation of evidence before an FAA employee designated as presiding officer. After the parties submit recommendations, the Administrator will review the record and other available relevant evidence, and make his determination, entering an appropriate order (14 CFR 626.50 - 626.64).<sup>9/</sup>

3. The Part 626 proceedings seek to implement the statutory safety provisions in specific limited ways. Notice of proposed structures makes possible proper charting on maps, a function envisaged by Section 1101 of the Act. The Administrator expanded the procedure beyond the requirement of notice in order to carry out his general responsibility for fostering air safety, e.g., Section 307(a).

By establishing air hazard criteria and providing for aeronautical studies and hearings, the Administrator has chosen to play an active part in accommodating proposed construction and aeronautical needs. The Administrator's purpose is to focus attention upon aeronautical needs and hazards. His determination of "hazard to air navigation" means that there is an incompatibility between the proposed structure and existing aeronautical activity. The determination does not itself prohibit or limit either the construction or air navigation. However, by means of the informal and formal proceedings under Part 626, the

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<sup>9/</sup> The Administrator is "not confined" to the transcript of the hearing (14 CFR 626.63). The regulations state that the hearing is "a fact-finding procedure" and hence is "non-adversary" and not subject to the Administrative Procedure Act (14 CFR 626.51).

Administrator has provided a forum for possible resolution of differences and accommodation of the competing air and ground interests by compromise and "moral persuasion."<sup>10/</sup>

This objective is made explicit in the regulations governing aeronautical studies. The FAA staff is directed to seek "adjustments in aviation requirements which would accommodate the proposed construction" (for example, a modification in flight patterns); and also, "to examine possible modification of the proposed construction, including revisions of the proposal which would eliminate the violation of criteria" (14 CFR 626.32(c)(1)). As a matter of fact, nearly every study thus far initiated has ended with such accommodations. While the regulations also provide for a public hearing to formalize the agency determination, this does not contemplate licensing or prohibitory orders. The regulations provide that the hearing is "non-adversary"; it is a means of "fact-finding" employed to assist the Administrator in his activities, not a basis for adjudicating private rights under the Administrative Procedure Act.

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<sup>10/</sup> See Hearings on "Review of the Federal Aviation Act," Aviation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2nd Sess., Part 2, p. 602 (FAA Director of the Bureau of Air Traffic Management, and the General Counsel).

Pepco (Pet. Br. 10, 17) cites references in the regulations' preamble to the "effect upon diverse non-aviation interests," as indicating an FAA intent to adjudicate between competing land uses. But this can better be explained as referring to the concern of non-aviation interests about the burdensome procedures themselves. Thus, the mere requirement of giving thirty days notice of construction, 626.10(a), would have an adverse effect on non-aviation interests that need to make rapid, emergency changes in ground structures such as oil drilling derrick operators and railroad companies.

While the Administrator does not purport to choose between the competing aeronautical and non-aeronautical uses, the superiority of one use over another may be resolved by application of local law. In conflicts arising between airports and adjacent landowners, traditional principles of equity law have provided the basis for judicial decision,<sup>11/</sup> and zoning boards and licensing authorities may control or limit either airport or other construction. And, where public airports are involved, the power of eminent domain is generally available to the airport to take whatever land or easements are required for safe and efficient operation. The FAA determination of hazard is useful to these bodies in showing the extent of the conflict between the aeronautical and non-aeronautical uses.<sup>12/</sup>

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<sup>11/</sup> Roosevelt Field v. Town of North Hempstead, 88 F. Supp. 177 (E.D. N.Y.) (water tower could not be enjoined); Guith v. Consumer's Power Co., 36 F. Supp. 21 (E.D. Mich.), and Capitol Airways, Inc. v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N.E. 2d 776 (erection of power lines could not be enjoined); Reaver v. Martin Theaters of Florida, 52 So. 2d 682 (Fla. S. Ct.) (drive-in airport not enjoinable); Air Terminal Properties v. New York, 172 Misc. 945, 16 N.Y.S. 2d 629 (planting of trees on highway near airport by city not enjoinable). However, the courts have enjoined the erection of objects that have no utility or are spite structures. Commonwealth ex rel. Schnader v. Von Bestecki, 30 Pa. D & C 137, [1937] US Av 1; Iowa City v. Tucker [1936] US Av 10 (Iowa Dist. Ct.); Liles v. Jarnigan [1950] US Av 90 (Tenn. Ch. Ct.).

<sup>12/</sup> Part 626 is not unique in this respect. For example, Section 309 of the Act requires notice to the FAA of construction or alteration of any airport (even though no federal funds are involved). Under Part 625 of the regulations, the Administrator has provided for the making of a determination as to the effect of the proposal "upon the safe, efficient use of airspace." This determination does not have any binding effect of itself but is to be furnished to the airport proponent, state aviation officials and other interested persons, 14 CFR 625.6(b), (c).

The FAA determination may also be utilized in a similar way by the Federal Communications Commission. The Administrator may find that a proposed radio antenna tower would interfere with air navigation, but his regulations expressly disclaim any intent to impair the Commission's authority to permit construction of such towers.<sup>13/</sup> The FCC, in turn, considers the FAA determinations as a ground for then taking "such further action as might be appropriate" (47 CFR 17.4). Among other conditions, the Commission may require the painting or illumination of an antenna that would be a menace to navigation (Section 303(q)) of the Federal Communications Act, 47 U.S.C. 303(q) and has detailed regulations on that subject, 47 CFR 17.21 - 17.45. The Commission may also refuse to issue a permit for the construction of an antenna that is hazardous to air navigation (Simmons v. Federal Communications Commission, 79 U.S. App. D.C. 264, 145 F. 2d 578).

**B. The FAA Determination Below is not a Reviewable Order**

We have shown that a "Determination of Hazard to Air Navigation" under Part 626 is a finding made by the Administrator to promote air safety, and has no mandatory effects upon any party. By its terms, as already noted, the determination here does not order Pepco to do or refrain from doing any act. Nor does the determination otherwise purport to alter, change, or declare Pepco's legal rights or liabilities. It merely finds that the proposed power line would be hazardous to aviation and would have an adverse effect upon Freeway Airport.

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<sup>13/</sup> A note to Section 626.50 of Part 626 states: "Any findings entered hereunder are without prejudice to the jurisdiction of the Federal Communications Commission to grant or deny applications for construction permits under the Communications Act of 1934, as amended."

Thus, we think it clear that Pepco may build the transmission lines without subjecting itself to the possibility of a civil penalty action under Section 901, 49 U.S.C. 1472, or to an enforcement proceeding under Section 1007, 49 U.S.C. 1487, for violation of an order of the Administrator.<sup>14/</sup> We submit, therefore, that the determination is not a reviewable order within this Court's jurisdiction under Section 1006 of the Act, 49 U.S.C. 1486.

1. A fundamental principle of judicial review of agency action is that resort may be had to the courts only when agency orders "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process" (C & S Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 95,<sup>103</sup> 112-113). As Judge Washington succinctly put it in a leading opinion of this Court, "In all cases held reviewable, something was happening to the complainant. Either someone was doing something to him or he was placed under an obligation to do something." California Oregon Power Co. v. Federal Power Commission, 99 U.S. App. D.C. 263, 270, 239 F. 2d 426, 436.

Even if the Administrator, under the Act and regulations, could take action against a proposed structure, he has not sought to do so. This Court has repeatedly held that judicial power does not extend to reviewing mere administrative findings or opinions upon which no

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<sup>14/</sup> An agency order must be a specific command to result in such penalties. Cf. National Labor Relations Board v. Express Publishing Co., 312 U.S. 426, 433; Odom v. Thompson, 85 F. Supp. 477 (N.D. Ala.).

coercive order is based. Continental Bank & Trust Co. v. Martin, 112 U.S. App. D.C. 354, 303 F. 2d 214; California Oregon Power Co. v. Federal Power Commission, 99 U.S. App. D.C. 263, 239 F. 2d 426; Helco Products Co. v. McNutt, 78 U.S. App. D.C. 71, 137 F. 2d 681; John P. Agnew & Co. v. Hooze, 69 U.S. App. D.C. 116, 99 F. 2d 349; See also Carolina Aluminum Co. v. Federal Power Commission, 97 F. 2d 435 (C.A. 4). See also United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, in which the Supreme Court held unreviewable an ICC determination which fixed the value of the appellee's property, <sup>15/</sup> but which took no action against the carrier.

2. Petitioner Pepco attempts to bring the Administrator's action within the ambit of judicial review power by arguing that "[e]ven if the Determination is not intended to have any adverse effect on Pepco, nevertheless, it is only realistic to recognize that at some time in the future some court might give weight to the Determination adverse to Pepco in an action, for example, brought to enjoin Pepco from constructing or maintaining its proposed transmission facilities, or one brought against Pepco to recover for damages suffered by a

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<sup>15/</sup> The Court there stated (273 U.S. at 309-310):

The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing anything; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil, or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research.

flyer as a result of his airplane coming into contact with Pepco's facilities [footnote omitted], or one brought by Pepco for damages suffered by Pepco as a result of an airplane coming into contact with its facilities" (Pet. 18). Jurisdiction to review the present determination cannot rest upon the speculative possibility of future proceedings before a court or other body, in which the hazards presented by the power lines might be litigated.

The prospect of subsequent litigation involving the power lines does not give the Administrator's determination the "immediate and practical impact"<sup>16/</sup> required for review. As the Supreme Court ruled in the leading decision of Eccles v. Peoples Bank, 333 U.S. 426, 432:

The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determination. Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing.

Similarly, in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 619 the Supreme Court refused to review a finding by the Federal Power Commission that past rates of Hope were unlawful, made only for the benefit of a state agency which had a consumer's fund to dispose of. The Court held that the finding was "the exercise solely of the function of investigation" and would adversely affect the complainant "only on the contingency of future administrative action" by other bodies. See also C&S Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. <sup>103</sup> 43, 112-113. The same point was made in

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<sup>16/</sup> Frozen Food Express v. United States, 351 U.S. 40, 44.

Wolff v. Benson, 103 U.S. App. D.C. 334, 258 F. 2d 428, when this Court refused to review the validity of an agricultural marketing agreement which might have provided the basis for action by the Tariff Commission and the President injurious to the complainants.

3. Pepco maintains, however, that the Determination should nonetheless be reviewable because otherwise it would be denied "any opportunity to attack the Determination as unauthorized or lacking in procedural due process, since, it having become 'final,' it would not be open to collateral attack" (Pet.Br. 19). But since Pepco does not contest the fact that the construction of its power lines would in fact violate the criteria established by the regulations, the subject matter of the FAA proceeding below would not be at issue in any subsequent case. It follows, therefore, that denial of review here will in no way prejudice petitioner's rights in any future litigation.

Apprehension of adverse consequences is apparently based on certain provisions of the Federal Aviation Act of 1958 (Pet. Br. 16). Section 101(24), 41 U.S.C. 1301(24), defines "Navigable airspace" to mean "airspace above the minimum altitudes of flight prescribed by regulations . . . and shall include airspace needed to insure safety in take-off and landing of aircraft," Section 104, 49 U.S.C. 1304, declares "a public right of transit through the navigable airspace" to exist in behalf of "any citizen." And Section 307(a), 49 U.S.C. 1348(a), vests the Administrator with power to "assign by

rule, regulation, or order the use of the navigable airspace . . . in order to insure the safety of aircraft, and the efficient utilization of such aircraft." Apparently Petitioner fears that in a future case involving the power lines, a court might rule adversely to petitioner on the ground that the power lines constituted a trespass upon the "navigable airspace." The Administrator's "determination" did not purport to construe these statutory provisions or pass upon the respective rights of the airport and Pepco against each other. Certainly a court in any future case will not be bound by the "determination" in construing the Federal Aviation Act and resolving the issues indicated by petitioner.

The only case which we have been able to discover which treats the effect given an official opinion that a structure would constitute a hazard to air navigation substantiates our view as to how a court would treat such an opinion. In Roosevelt Field v. Town of North Hempstead, 88 F. Supp. 177 (E.D. N.Y.), decided in 1950, plaintiff, owner and operator of an airfield, sought an injunction against the maintenance of a village water-supply tower on the theories that the tower was considered an aeronautical hazard by the Civil Aeronautics Administrator and that it was both a public and a private nuisance. <sup>17/</sup>

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<sup>17/</sup> In an earlier phase of this litigation, defendant moved to strike references in the complaint to the C.A.A. designation of hazard to air navigation and to dismiss the complaint for lack of federal jurisdiction. Both motions were denied 84 F. Supp. 456 (E.D. N.Y.). The attack on the complaint was grounded on the premise that no federal statute conferred a right of action for violation of the CAA regulations. The court held that a federal question was presented by an allegation of interference with air navigation, and that a claim upon which relief may be granted may be based upon a statute or regulations even though by their terms they do not create such a right.

The water tower protruded 38 feet above the minimum height established by the Civil Aeronautics Authority for maneuvering for landing and take-off. The court noted that the structure was regarded by the CAA as an aeronautical hazard (88 F. Supp. at 182, 183), but also noted that "[t]here was no regulation, ruling or standard adopted by the CAA which either in terms or by implication purported to prohibit the erection of this water tower" (at 182).<sup>18/</sup> One of plaintiff's theories in that case was similar to that which Petitioner suggests might eventuate in its injury:

The plaintiff's theory is thus stated in its brief: "No 'taking' of defendants' property in the super-adjacent air is involved in this action, for the reason that their use of the upper reaches thereof had already been taken by the exercise of such police powers; rather, there has been a 'taking' by the defendants of property in the public domain through which the plaintiffs have 'freedom of transit.' (at 182).

The court found no difficulty in rejecting this theory on the ground that neither the applicable statute nor regulation purported to "take" the airspace for public use above the established minimum altitude in the "exercise of the police power."<sup>19/</sup> Consequently, plaintiff was held to have no property rights in the airspace over

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<sup>18/</sup> Correspondence from the CAA to the defendants disclaimed the authority to prohibit the construction of the tower (88 F. Supp. 177).

<sup>19/</sup> While the CAA regulations did not provide for determinations of hazard to air navigation, but only required the giving of notice of proposed construction (fn. 7, *supra*), there was no doubt in that case that the agency considered the tower hazardous to air navigation.

defendants' land.<sup>20/</sup> On the nuisance theory advanced by plaintiff the court weighed the equities and denied the injunction.

Accordingly, the possibility of future litigation involving the respective rights of petitioner and intervenors does not provide a basis for review of the Administrator's determination.

C. The Determination is Valid

Our interpretation of the determination in the context of the Act and regulations has shown that the determination is not a reviewable order. This discussion also clearly answers the other issues sought to be raised by petitioner--which need not be reached by this Court--concerning the validity of the determination.

Petitioner does not contest the factual determination that its power lines will be a hazard to air navigation, in the sense that their construction and use will be incompatible with safe and efficient use of the Freeway Airport. The making of such a determination is within the statutory power of the Administrator to promote air safety. The determination has no coercive or binding adjudicative effect, so there is clearly no possibility of a taking which would require compensation. And since the Administrator does not purport to adjudicate

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<sup>20/</sup> Since this decision the definition of navigable airspace was modified by the Federal Aviation Act of 1958 to include "airspace needed to insure safety in take-off and landing of aircraft" Section 101(24), 49 U.S.C. 1301. This is the basis for petitioner's apprehension of a future ruling against it.

between the airport and the power lines, there is no reason for a hearing upon the public interest in the respective uses.

**CONCLUSION**

For the foregoing reasons, the petition for review should be dismissed.

Respectfully submitted.

WILLIAM H. ORRICK, JR.,  
Assistant Attorney General.

LIONEL KESTENBAUM,  
I. DANIEL STEWART, JR.,  
Attorneys.

AUGUST 1963.

**APPENDIX**

**Equity No. B-9576**

**IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND**

**POTOMAC ELECTRIC POWER COMPANY, Plaintiff,**

**v.**

**IRVIN R. RODENHAUSER (also known as Irving R. Rodenhauser) and FRANCES M. RODENHAUSER, his wife, Defendants.**

**DECREE**

The above matter having come before the Court for determination, and all parties to the proceeding having been heard and having indicated their consent to the passage of the following Decree, it is, this 27th day of March, 1963, by the Circuit Court for Prince George's County, Maryland,

**ORDERED, DECLARED AND ADJUDGED:**

1. That Plaintiff Potomac Electric Power Company, its successors and assigns, may lawfully construct, operate and maintain on its 250 foot wide strip of land described in paragraph 4 of the Bill of Complaint herein, electric power and energy transmission facilities, such as towers, poles, structures, wires, cables and conduits; and

2. That Defendants Irvin R. Rodenhauser and Frances M. Rodenhauser, their heirs, executors, administrators, successors and assigns, may lawfully operate an airport on their property described in paragraph 5 of the Bill of Complaint herein, provided, however, that they may not operate said airport in such a manner as to invite or permit aircraft,

in the course of their use of such airport, to fly over Plaintiff's said strip of land in such manners and at such altitudes as to interfere with Plaintiff's usage of its said strip of land and the superjacent air space for its said electric transmission facilities, or as to expose such facilities to hazard or danger.

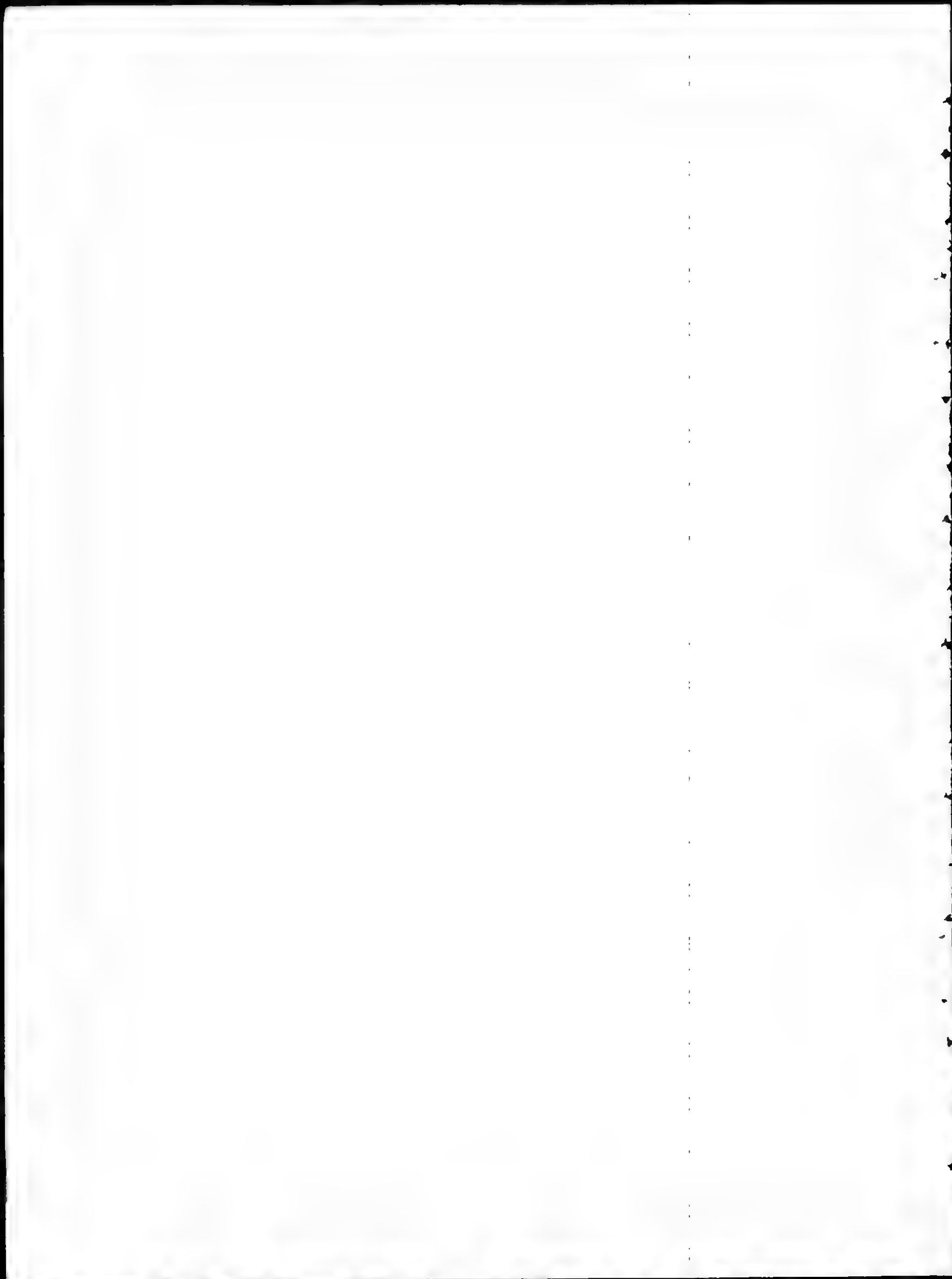
3. Nothing contained herein shall be deemed to affect in any way any rights or duties which may rest in the parties with respect to the use of the navigable airspace, under and by virtue of the provisions of the Federal Aviation Act of 1958, or its predecessor, or with respect to the use of their respective properties under the applicable zoning ordinance, or uses thereunder, of the Maryland-Washington Regional District.

/s/ Roscoe H. Parker  
JUDGE

Agreed:

\_\_\_\_\_  
William J. McCarthy,  
Attorney for Plaintiff

\_\_\_\_\_  
Paul M. Nussbaum,  
Attorney for Defendants.



REPLY BRIEF AND SUPPLEMENTARY APPENDICES  
FOR PETITIONER

---

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,706

POTOMAC ELECTRIC POWER COMPANY, *Petitioner*,

v.

N. E. HALABY, Administrator of the Federal Aviation  
Agency, *Respondent*

(IRVIN R. and FRANCES M. RODENHAUSER, *Interveners*).

On Petition for Review of an Order of the Administrator  
of the Federal Aviation Agency

United States Court of Appeals  
for the District of Columbia Circuit

FILED SEP 10 1963

Nathan J. Finklow  
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September 10, 1963

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## TABLE OF CONTENTS

	Page
THE POSITIONS OF THE PARTIES .....	1
CONCLUSION .....	7
APPENDIX A—Table of FAA determinations of hazard to air navigation published in Federal Register between July 15, 1961 and August 31, 1963 .....	8
APPENDIX B—FAA determination of hazard to air navigation <i>in re</i> Pacific Gas and Electric Co., July 23, 1963, 28 F.R. 7681 .....	9

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,706

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POTOMAC ELECTRIC POWER COMPANY, *Petitioner*,

v.

N. E. HALABY, Administrator of the Federal Aviation  
Agency, *Respondent*

(IRVIN R. and FRANCES M. RODENHAUSER, *Intervenors*).

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On Petition for Review of an Order of the Administrator  
of the Federal Aviation Agency

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REPLY BRIEF AND SUPPLEMENTARY APPENDICES  
FOR PETITIONER

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## THE POSITIONS OF THE PARTIES\*

In its Petition for Review Pepco asks, as an alternative remedy, that an appropriate order be entered by this Court dismissing the Petition on the ground that the Ad-

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\* While Pepco does not think it necessary to discuss the Respondent's "Counter-Statement of the Case" (Respondent's Brief 1-6), it does wish to note that (i) it has never admitted that the Intervenors' airport "has been in operation since 1942 or 1946" but has never been given an opportunity to submit evidence to the contrary, and (ii) Note 5 on page 6 of the Respondent's Brief is in error in stating that Pepco asked the Prince George's County Circuit Court for an injunction. The only relief sought in the action was a declaratory judgment.

ministrator's Determination cannot adversely affect Pepco (JA 30). And in its principal brief Pepco says, at page 16, that it is convinced, in the light of the lack of authority in the Administrator to control the use of airspace by non-aeronautical interests (as made clear in such brief), that

"Since the Administrator is primarily concerned with the safety of the flying public and since he must be presumed to be aware of his lack of authority over non-aeronautical uses of the airspace . . . , the Determination [was] intended simply as a factual finding of a potential hazard to flying operations at Freeway Airport which, when it becomes a reality, will have to be recognized by the Intervenor proprietors of the airport in determining whether to continue to use the affected runways and thus expose their users to the risks inherent in the existence of the hazard." (Petitioner's Brief 15)

The Respondent Administrator, in his brief, takes the position that

"... The FAA determination is a declaration that the structure is not compatible with air navigation safety requirements but does not purport to prohibit the erection or alteration of the structure. ..." (Respondent's Brief 7)

Further, the Administrator says that he "does not purport to choose between the competing aeronautical and non-aeronautical uses" (Respondent's Brief 14) and that the Determination

"... did not purport to construe [Secs. 101(24) (PA 4), 104 (PA 5) and 307(a) (PA 8) of the Act] or pass upon the respective rights of the airport and Pepco against each other. ..." (Respondent's Brief 20)

Accordingly, the Administrator asks that the Petition be dismissed, as non-reviewable.

Finally, the intervenor proprietors of the airport file no brief of their own, but simply adopt the Administrator's brief, saying that they "are satisfied that [it] adequately states" their position.

Thus, the parties are in apparent agreement that the Petition should be dismissed. However, from the standpoint of Pepco it is essential that such dismissal be accompanied and explained by an opinion of the Court adjudicating (i) that the Determination is merely a finding of fact by the Administrator that for aircraft to fly through, or in dangerous proximity to, the airspace occupied by the structures and wires which Pepco proposes to erect on its property will be hazardous, both for the aircraft and for such Pepco facilities; (ii) that the Determination in no way constitutes a finding or holding by the Administrator that the use of such airspace, by aircraft landing or taking off at Freeway Airport, is the preferred or "efficient" use thereof; and (iii) that the Determination did not operate to "assign" the use of such airspace within the meaning of Sec. 307(a) of the Act (PA 8).

It is submitted that the position taken by the Administrator in his brief and adopted by the Intervenor provides full warrant for such an adjudication by the Court, particularly in the context of Pepco's arguments, in its principal brief, as to the lack of power in the Administrator to deprive Pepco of its rights as a landowner, which arguments neither the Administrator nor the Intervenor have seen fit to attempt to answer. And if the Court should merely dismiss the Petition without supporting the dismissal by such an adjudication as to the meaning and effect of the Determination, Pepco would be exposed to

the possibility of a future interpretation of such meaning and effect contrary to the position taken in the Administrator's brief and adverse to Pepco's rights as the owner of its transmission line real property.\*

Although the parties are thus in apparent agreement that the Petition should be dismissed because the Determination cannot affect Pepco adversely, this Court still has before it, of course, the task of ascertaining the true meaning and effect of the Determination. As a possible aid to the Court in so doing, we offer the following brief analysis of what appears to us to be the salient point at issue:

1. The Determination was issued pursuant to Part 626 of the Administrator's Regulations, the preamble to which says that "the Act authorizes and directs the Administrator to regulate the use of the navigable airspace in order to insure aircraft safety and efficient utilization" (PA 21). Part 626 assigns as the authority for its issue Secs. 104 (PA 5), 307 (PA 8), 313 (PA 11), 1001 (PA 13), and 1101 (PA 16) of the Act. The only one of such sections that uses the term "efficient utilization" of airspace is Sec. 307.

2. Sec. 307 directs the Administrator "to assign by rule, regulation, or order the use of the navigable airspace under such terms . . . as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace".

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\* As to this possibility, the Respondent merely states that "Certainly a court in any future case will not be bound by the 'determination' in construing the . . . Act . . ." (Respondent's Brief 20). The difficulty, as we see it, is that if this Court should dismiss the Petition without an adequate adjudication as to the meaning and effect of the Determination, a court in some subsequent case might consider the dismissal to have affirmed the Determination as a final decision by the Administrator that the use by aircraft of the airspace superjacent to Pepco's property is the "efficient utilization" of such airspace and to have foreclosed any collateral attack on the power of the Administrator to make such a determination.

3. § 626.1 of Part 626 says that one of the purposes of the Part is "to determine the effects of . . . structures [which would exceed the criteria in Part 626] upon the safety of aircraft in flight and the efficient utilization of airspace" (PA 24), and § 626.2 defines "Determination" to mean "a decision . . . as to the effect upon air navigation of a specific construction proposal, from an airspace utilization standpoint" (PA 25).

4. The opening paragraph of the Determination states that the FAA "has conducted a study to determine [the] effect [of the proposed Pepco construction] upon the safe and efficient utilization of airspace" (JA 17).

5. In its principal brief Pepco argues, among other things, that the Determination is defective because, although apparently issued under the authority of Sec. 307(a) of the Act (PA 8), it contains no finding as to the "efficient utilization" of the airspace (Petitioner's Brief 38).

6. In his brief the Administrator argues, presumably relying on the absence from the Determination of an express finding as to "efficient utilization," that the Determination "did not purport to construe these statutory provisions [referring to Secs. 104 and 307(a) of the Act] or pass upon the respective rights of the airport and Pepco against each other" (Respondent's Brief 20).

7. Thus, the Administrator seizes upon the absence from the Determination of what appears to Pepco to be an essential finding, as the ground for his argument that the Determination is not an attempted assignment of the use of airspace under Sec. 307(a) of the Act (PA 8) and hence is not reviewable. This, we submit, is the basic issue before the Court—was the Determination an attempt to "assign" the use of airspace within the meaning of Sec. 307(a) which was invalid for the numerous reasons given in Pepco's principal brief, or was it simply a wholly unnecessary "finding of the physical fact that a 125 foot tall tower occupying airspace through which an airplane must

fly will be a hazard to the flight of such airplane" (Petitioner's Brief 42)?

8. As casting possible light upon this issue, we point out that between the effective date of Part 626 and August 31, 1963, a total of 43 determinations of hazard to air navigation were published by the Administrator in the Federal Register.\* Each of such determinations contained, in its opening paragraph, language similar to that found in our Determination, i.e., that the FAA had conducted a study to determine the effect of the proposed construction upon the safe and efficient utilization of airspace. Fifteen of such determinations (including the one involved in this case), made no express finding as to the efficient utilization of airspace, but the remaining 28 of such determinations each contained a finding that the proposed construction would have a substantial adverse effect upon the efficient utilization of airspace. A recent example of such latter type of determination, in a situation apparently almost identical to that involved here, is attached hereto as Appendix B.

Since it is not reasonable to suppose that the Administrator intentionally makes two different kinds of determinations to be applied to substantially identical situations—one of which is intended merely to point out the physical incompatibility of two competing airspace uses and the other of which is intended to decide what is the "efficient utilization" of the airspace, it is possible that this Court might consider the Determination here involved to be intended as an assignment of airspace use despite its apparently inadvertent omission of an express finding as to efficient utilization.

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\* The respective Federal Register citations are given in Appendix A hereto.

**CONCLUSION**

Regardless of the intent of the Administrator in issuing the Determination, it is clear, as Pepco says in its principal brief (p. 18),

“... that the general tenor of the Determination, and the Regulations under which it is issued, is such as to suggest to the reader that the proposed structures have been outlawed”.

Such being the case, this Court, in response to Pepco's Petition for Review, should make clear either that the Determination can have no such effect or that, having such effect, it is beyond the statutory and constitutional powers of the Administrator.

Respectfully submitted,

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*Attorneys for the Petitioner.*

Washington, D. C.

September 10, 1963

## APPENDIX A

FAA Determinations of Hazard to Air Navigation  
Published in Federal Register between July 15, 1961 and  
August 31, 1963

Containing Finding as to Efficient Utilization of Airspace	Containing No Finding as to Efficient Utilization of Airspace
27 F.R. 10594	26 F.R. 10105
27 F.R. 10972	26 F.R. 10107
27 F.R. 11027	26 F.R. 10248
27 F.R. 12987	26 F.R. 10373
28 F.R. 359	26 F.R. 10944
28 F.R. 1747	27 F.R. 2938
28 F.R. 2248	27 F.R. 3016
28 F.R. 2511*	27 F.R. 7464
28 F.R. 2512	27 F.R. 7580
28 F.R. 2537	27 F.R. 9665
28 F.R. 3426	§27 F.R. 10593
28 F.R. 3792	27 F.R. 11026
28 F.R. 4041	27 F.R. 11241
28 F.R. 4593	28 F.R. 1748
28 F.R. 5539	28 F.R. 4593
28 F.R. 5692	
28 F.R. 6982	
28 F.R. 6838	
28 F.R. 7108	
28 F.R. 7403*	
†28 F.R. 7681	
28 F.R. 8476	
28 F.R. 9447	
28 F.R. 9544*	
28 F.R. 9545	

\* Two determinations are printed on this page.

† This determination is printed in Appendix B.

§ This is the Determination involved in this case.

**APPENDIX B**

[28 F.R. 7681]

FEDERAL AVIATION AGENCY

[OE Docket No. 63-WE-5]

PACIFIC GAS AND ELECTRIC CO.

**Determination of Hazard to Air Navigation**

The Federal Aviation Agency has circularized the following proposal for aeronautical comment and has conducted a study (4-OE-2237) to determine its effect upon the safe and efficient utilization of navigable airspace.

The Pacific Gas and Electric Company, San Francisco, California, proposes to construct a 12,000-volt transmission line near Meadowlark Field, an airport with a single runway 1,700 feet in length at Livermore, California. In the vicinity of the airport, the line would be supported by six wooden poles aligned from north to south for a distance of approximately 805 feet, then west to east for a distance of approximately 440 feet near latitude  $37^{\circ}39'40''\text{N.}$ , longitude  $121^{\circ}41'45''\text{W.}$ , at an overall height of 760 feet above mean sea level, 30 feet above ground. The north/south portion of the line would cross the extended runway centerline of Meadowlark Field at a distance of 105 feet west of the west end of the runway, and would exceed the standards contained in §§ 77.27(b)(3) and (c)(3)(iii) of the Federal Aviation Regulations by 23 and 22 feet, respectively.

The transmission line would reduce the effective length of the runway to approximately 1,200 feet, an unsafe length, and would virtually eliminate use of Meadowlark Field as an emergency field. This airport is located in the most fogfree area of the San Francisco bay area. Accordingly, it is the finding of the Agency the proposed construction would have a substantial adverse effect upon aeronautical operations at Meadowlark Field.

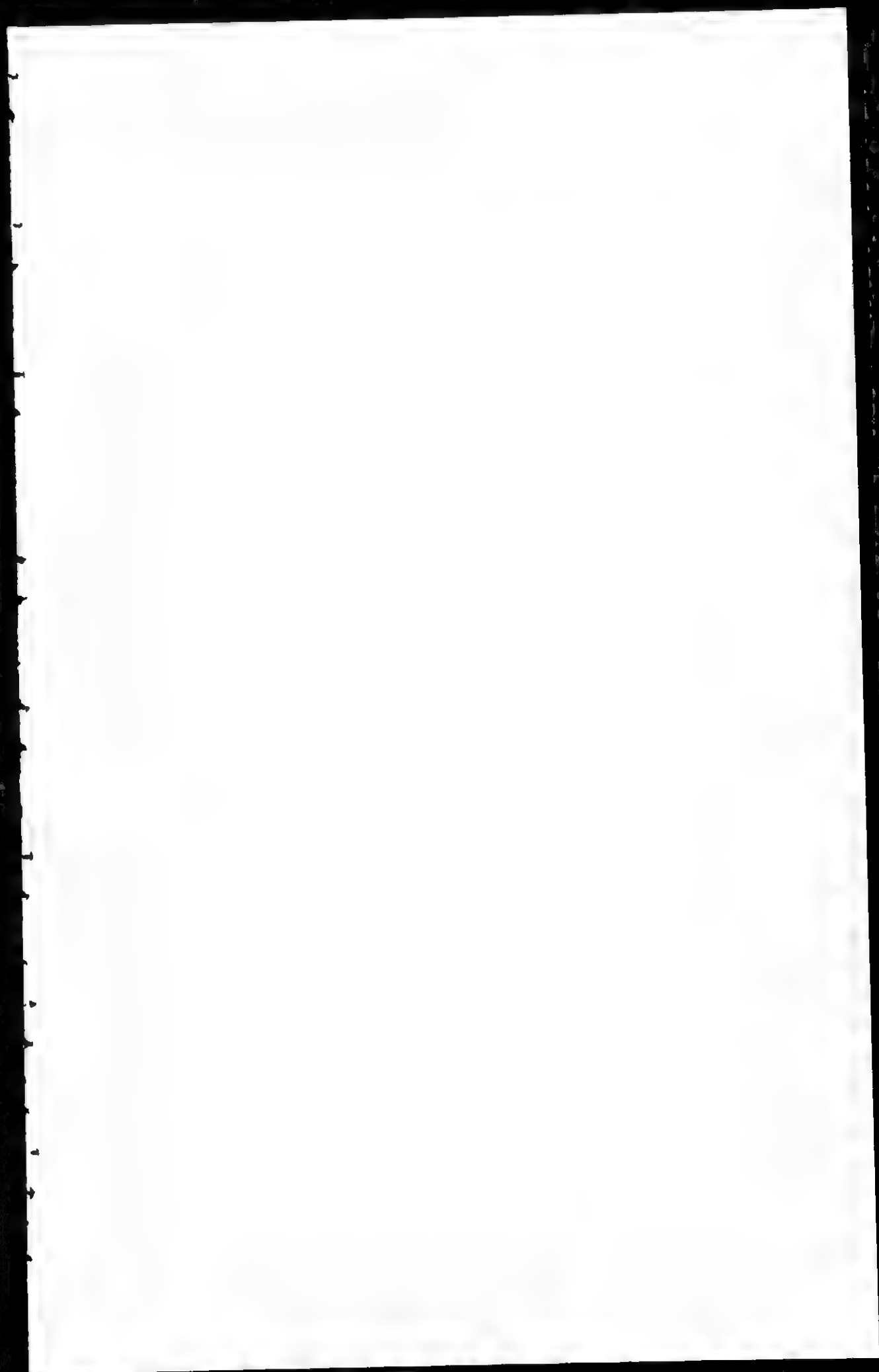
Therefore, pursuant to the authority delegated to me by the Administrator (§ 77.37 [New]), *it is found that the proposed transmission line would have a substantial adverse effect upon the safe and efficient utilization of navigable airspace*; and it is hereby determined that the proposed structure would be a hazard to air navigation [emphasis supplied].

This determination is effective as of the date of issuance and will become final 30 days thereafter unless an appeal is filed under § 77.39 [New] (27 F.R. 10352). If the appeal is denied, the determination will then become final as of the date of the denial or 30 days after the issuance of the determination, whichever is later.

Issued in Washington, D.C., on July 23, 1963.

RALPH H. FLETCHER,  
*Acting Chief,*  
*Obstruction Evaluation Branch.*

[F.R. Doc. 63-7899; Filed, July 26, 1963; 8:45 a.m.]



BRIEF AND APPENDIX FOR PETITIONER AND  
JOINT APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,706

506

POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

VS.

N. E. HALABY, Administrator of the Federal Aviation  
Agency, *Respondent*

(IRVIN R. and FRANCES M. RODENHAUSER, *Intervenors*).

On Petition for Review of Order of the Administrator  
of the Federal Aviation Agency

United States Court of Appeals  
for the District of Columbia Circuit

FILED JUN 14 1963

Nathan J. Paulson  
CLERK

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Washington 4, D. C.  
*Attorneys for the Petitioner*

June 17, 1963.

### STATEMENT OF QUESTIONS PRESENTED

1. Whether a determination by the Respondent Administrator that certain power lines, proposed to be constructed by the Petitioner on its fee-owned property adjacent to a privately owned and operated airport, would constitute a hazard to air navigation adversely affects the Petitioner and hence is reviewable by this Court.

2. If the determination is so reviewable, whether the Administrator had statutory authority to make the determination.

3. If the determination is so reviewable and if the Administrator had such authority, whether such authority could constitutionally be exercised by the Administrator.

4. If the determination is so reviewable, if the Administrator had such authority, and if he could constitutionally exercise it, whether that authority could lawfully be exercised without affording the Petitioner an opportunity to present evidence as to the respective public interests, if any, involved in the airport and in the Petitioner's power lines, and without the Administrator making findings, supported by substantial evidence of record, as to the efficient utilization of the navigable airspace.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,706

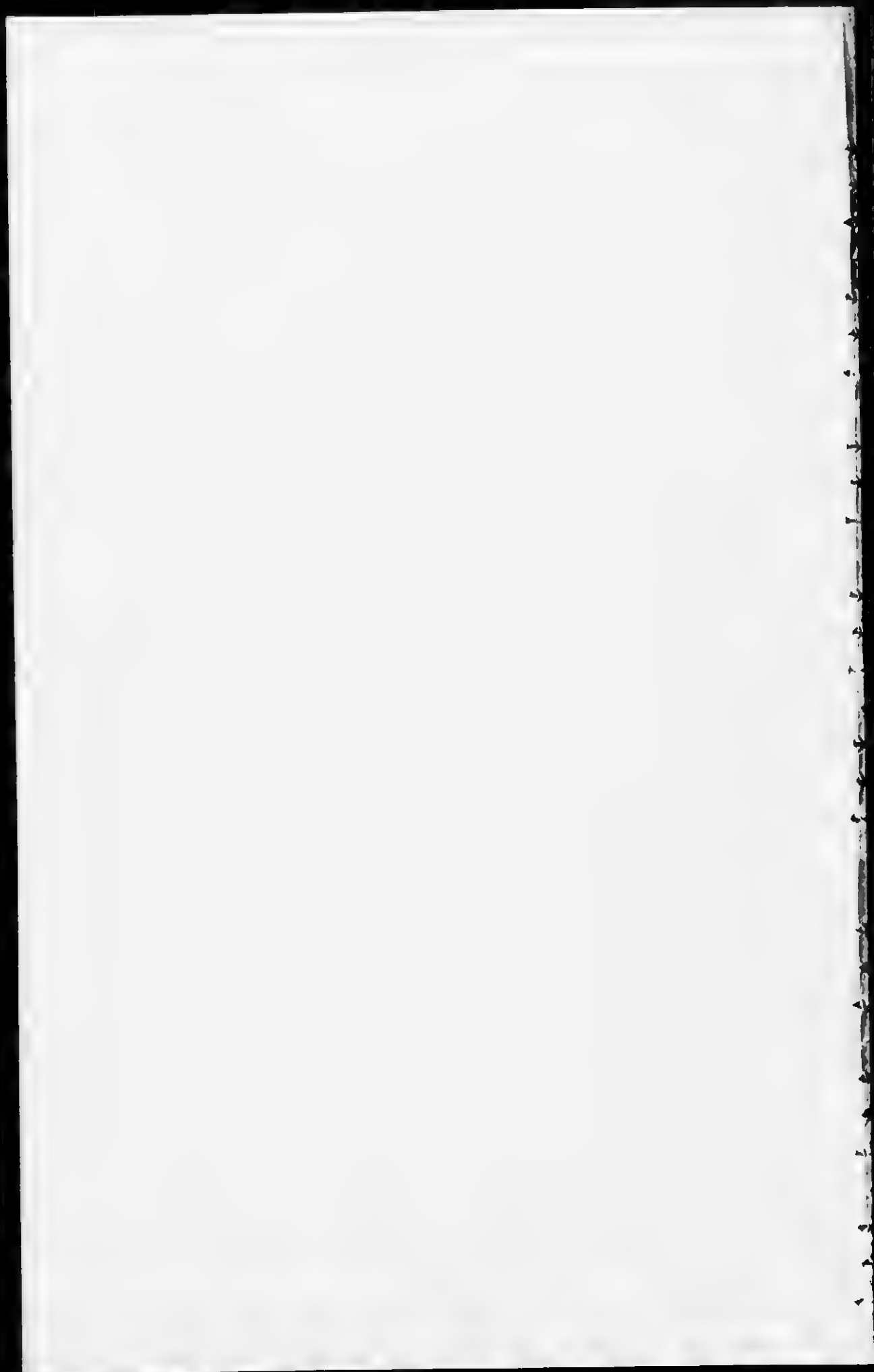
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POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

vs.

N. E. HALABY, Administrator of the Federal Aviation  
Agency, *Respondent*

(IRVIN R. and FRANCES M. RODENHAUSER, *Intervenors*).



## TABLE OF CONTENTS

	Page
STATEMENT OF QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES	
Cases .....	iii
Constitution of the United States .....	iii
Statutes .....	iii
Regulations and Notices of the Federal Aviation Agency .....	iv
Congressional Hearings and Reports .....	v
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE CASE .....	1
STATUTES AND REGULATIONS .....	7
STATEMENT OF POINTS .....	7
SUMMARY OF ARGUMENT .....	7
ARGUMENT:	
I. The Determination is reviewable because it might adversely affect Pepco, unless it is made clear, by revision of the Determination or by judicial pronouncement, that it cannot so operate	9
1. The effect of the Determination on Pepco is in doubt .....	9
2. Its effect being in doubt, it is possible that the Determination might operate to affect Pepco adversely .....	16
3. If the Determination adversely affects Pepco, it is reviewable. If such effect is not intended, the possibility of adverse effect should be avoided by a revision of the language of the Determination or by a judicial pronouncement making clear that it cannot have adverse effect on Pepco .....	18

	Page
II. If the Determination adversely affects Pepco, its issuance exceeded the statutory authority of the Administrator .....	20
1. The Act does not vest the Administrator with power to assign the use of navigable airspace by non-aeronautical structures .....	20
(1) The language of the Act .....	22
(2) The legislative history of the Act .....	25
2. Airspace required for landings and takings-off at Freeway Airport is not "navigable air- space" and hence its use is not subject to assignment by the Administrator .....	29
3. Pepco's proposed structures will not affect "air commerce" and hence the Determination is beyond the Administrator's statutory au- thority .....	34
III. The Determination, if it adversely affects Pepco and is not in excess of the Administrator's statutory authority, is invalid because issued in violation of the Fifth Amendment to the Con- stitution .....	35
IV. The Determination, if it adversely affects Pepco and is not in excess of the Administrator's statutory and constitutional authority, is invalid because Pepco was not permitted to present evi- dence, and the Administrator made no finding, with respect to the efficient utilization of the con- cerned airspace .....	38
CONCLUSION .....	43
PETITIONER'S APPENDIX (with table of contents)	
JOINT APPENDIX (with table of contents)	

## TABLE OF AUTHORITIES

	Page
<b>CASES:</b>	
Atchison, T. & S. F. R. Co. v. United States (1935), 295 U.S. 193, 79 L. ed. 1382, 55 S. Ct. 748 .....	35
Cline v. Kansas Gas & Elec. Co. (10th Cir. 1958), 260 F. 2d 271 .....	32
Frozen Food Express v. United States (1956), 351 U.S. 40, 100 L. ed. 910, 76 S. Ct. 569 .....	19
* Griggs v. Allegheny County (1962), 369 U.S. 84, 7 L. ed. 2d 585, 82 S. Ct. 531 .....21, 29, 30, 31, 33, 35	35
Joint Anti-Fascist Refugee Comm. v. McGrath (1951), 341 U.S. 123, 95 L. ed. 817, 71 S. Ct. 624 .....	19
La Com v. Pacific Gas & Elec. Co. (Dist. Ct. App. 1955), 132 Cal. App. 2d 114, 281 P. 2d 894 .....	18
Madisonville Traction Co. v. St. Bernard Mining Co. (1905), 196 U.S. 239, 49 L. ed. 462, 25 S. Ct. 251 ..	32
Panama Refining Co. v. Ryan (1935), 293 U.S. 388, 79 L. ed. 446, 55 S. Ct. 241 .....	35
Strother v. Pacific Gas & Elec. Co. (Dist. Ct. App. 1949), 94 Cal. App. 2d 525, 211 P. 2d 624 .....	18
United States v. Causby (1946), 328 U.S. 256, 90 L. ed. 1206, 66 S. Ct. 1062 .....21, 37	37
United States v. Los Angeles & S. L. R. Co. (1927), 273 U.S. 299, 71 L. ed. 651, 47 S. Ct. 413 .....	19
Yonkers v. United States (1944), 320 U.S. 685, 88 L. ed. 400, 64 S. Ct. 327 .....	35
 <b>CONSTITUTION OF THE UNITED STATES:</b>	
* Amendment V .....	7, 8, 33, 35, 36, 38
 <b>STATUTES:</b>	
Civil Aeronautics Act of 1938, § 302, 52 Stat. 973, 985 (June 23, 1938), as amended (repealed) .....	27
Federal Airport Act of 1946, 60 Stat. 170 (May 13, 1946), as amended, 49 U.S.C.A. §§ 1101-1119 ....30, 31	31
§ 13, 60 Stat. 177, as amended, 49 U.S.C.A. § 1112 .....	30

---

\* Cases or authorities chiefly relied upon are marked by asterisks.

	Page
International Aviation Facilities Act of 1948, 62 Stat. 450 (June 16, 1948), as amended, 49 U.S.C.A. §§ 1151-1160 .....	32
Act of June 25, 1948, c. 646, § 1491, 62 Stat. 940, as amended, 28 U.S.C.A. § 1491 .....	37
*Federal Aviation Act of 1958, 72 Stat. 731 (August 23, 1958), as amended, 49 U.S.C.A. §§ 1301-1542 .....	1, 22
§ 101, 72 Stat. 737, as amended, 49 U.S.C.A. § 1301 .....	16, 29, 34
§ 103, 72 Stat. 740, 49 U.S.C.A. § 1303 .....	22
§ 104, 72 Stat. 740, 49 U.S.C.A. § 1304 .....	9, 16, 29
§ 301, 72 Stat. 744, 49 U.S.C.A. § 1341 .....	21, 22
§ 302, 72 Stat. 744, 49 U.S.C.A. § 1342 .....	21
§ 303, 72 Stat. 747, 49 U.S.C.A. § 1344 .....	22, 33, 37
§ 305, 72 Stat. 749, 49 U.S.C.A. § 1346 .....	16, 23
• § 307, 72 Stat. 749, 49 U.S.C.A. § 1348 ...	8, 9, 14, 16, 20, 23, 26, 27, 29, 33, 38, 41
§ 308, 72 Stat. 750, 49 U.S.C.A. § 1349 ....	24, 30, 31, 32, 33, 35, 37
§ 309, 72 Stat. 751, 49 U.S.C.A. § 1350 .....	24, 31
§ 312, 72 Stat. 751, 49 U.S.C.A. § 1353 .....	24
§ 313, 72 Stat. 752, 49 U.S.C.A. § 1354 .....	9
§ 1001, 72 Stat. 788, 49 U.S.C.A. § 1481 .....	9
§ 1006, 72 Stat. 795, as amended, 49 U.S.C.A. § 1486 .....	1
§ 1101, 72 Stat. 797, 49 U.S.C.A. § 1501 ..	9, 14, 17, 34

REGULATIONS AND NOTICES OF THE FEDERAL AVIATION  
AGENCY:

Federal Aviation Agency, Regulations, Part 626— <i>Notice of Construction or Alteration</i> , 26 F.R. 5287 (1961), as amended (superseded, December 12, 1962) .....	1, 9, 14, 16, 17, 20, 43
• Preamble .....	9, 10, 11, 14, 17
§ 626.1 .....	12
§ 626.12 .....	6
§ 626.13 .....	3

\* Cases or authorities chiefly relied upon are marked by asterisks.

# Table of Authorities Continued

v

	Page
§ 626.33 .....	1, 40
§ 626.34 .....	1, 5, 6
§ 626.50, as amended .....	14
§ 626.51 .....	12, 15
Federal Aviation Agency, Regulations, Part 77— <i>Notice of Construction or Alteration Affecting Navigable Airspace</i> , § 77.37, 14 C.F.R. § 77.37 (effective December 12, 1962) .....	40
Federal Aviation Agency, Miscellaneous Amendments to Part 626 of Regulations, Preamble, 26 F.R. 8171 (1961) .....	13, 14
Federal Aviation Agency, Notice of Proposed Rule Making, Preamble, 25 F.R. 8911 (1960) .....	9, 12, 39
CONGRESSIONAL HEARINGS AND REPORTS:	
Hearings on H.R. 12616 Before a Subcommittee of the House Committee on Interstate and Foreign Com- merce, 85th Cong., 2d Sess. (1958) .....	28
Hearings on S. 3880 Before the Subcommittee on Aviation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958) .....	28
H.R. Report No. 2360, 85th Cong., 2d Sess. (1958) ...	26
S. Report No. 1811, 85th Cong., 2d Sess. (1958) ..	20, 25, 26



## **JURISDICTIONAL STATEMENT**

This is an appeal by Potomac Electric Power Company ("Pepco") to review a "Determination of Hazard to Air Navigation" (the "Determination") issued by the Administrator of the Federal Aviation Agency (the "Administrator") pursuant to Regulations (PA 24)\* promulgated by the Administrator allegedly under authority conferred on him by the Federal Aviation Act of 1958 (the "Act", Act of Aug. 23, 1958, PL 85-726, 72 Stat. 731, 49 USC §§ 1301-1542).

The Determination (JA 17)\*\* was issued on October 19, 1962 and on November 16, 1962, being a date within 30 days of such date of issuance, as required by Secs. 626.33 and 626.34 of the Regulations (PA 35 and 36) in order to prevent the Determination from becoming "final", Pepco filed with the Administrator a petition for a public hearing (JA 19). Subsequently, by letter dated February 1, 1963 (JA 26), Pepco was advised by the Deputy Administrator that such petition was denied. Under Sec. 626.33 of the Regulations (PA 35), the Determination became "final" upon such denial.

With one non-relevant exception, Sec. 1006(a) of the Act (PA 14) provides that any order issued by the Administrator is subject to review by this Court.

## **STATEMENT OF THE CASE**

On or about December 27, 1961, Pepco filed with the Administrator a notice (JA 2) of its proposed construction, on property owned in fee by Pepco, of certain above-ground electric transmission facilities adjacent to

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\* Throughout this brief page references to the Petitioner's Appendix, below, are made in this manner.

\*\* Throughout this brief page references to the Joint Appendix, below, are made in this manner.

the Freeway Airport, a privately owned and operated airport for light aircraft located in Prince George's County, Maryland. At the time Pepco filed such notice with the Administrator, the Freeway Airport had not obtained "airspace clearance" from the Administrator (JA 4). Pepco now understands that no such clearance has been given the airport, on the ground that its operations allegedly antedated the requirement of such clearance. Pepco was not given any opportunity to be heard with respect to such alleged antedating.

Pepco is a regulated electric utility doing business in the District of Columbia, Maryland and Virginia and is the sole supplier of electric power and energy to the public (including most of the buildings, installations and facilities of the Federal government) in a large portion of the Washington metropolitan area (JA 19). It is now, and throughout the proceedings under review has been, engaged in constructing a new steam-electric generating station at Chalk Point in the extreme southeasterly corner of Prince George's County, Maryland (JA 21).

The above-ground electric transmission facilities which Pepco proposes to construct adjacent to Freeway Airport will be part of a 230,000 volt transmission line connecting the new Chalk Point Generating Station (expected to go into commercial operation in the Spring of 1964) with the rest of Pepco's power supply system. Pepco's study to fix the route of such transmission line began in the Fall of 1956. By mid-1958 such route (including the portion of the right-of-way in the vicinity of Freeway Airport) had been largely determined (using aerial photographs which gave no indication of any airport operation on the property which is now the site of Freeway Airport), and by November 19, 1960 all but one of the necessary property acquisitions in the vicinity of the airport had been completed. The final such acquisition was completed on May 9, 1961 (JA 21).

The location, construction, maintenance and operation of such transmission line, including the portion thereof to be constructed in the vicinity of Freeway Airport, are essential to the performance by Pepco of its public utility obligations and essential to the furnishing of adequate electric service to the Washington metropolitan area, including the many governmental buildings, installations and facilities located therein (JA 22).

Following the filing with the Administrator of the notice of its proposed construction, Pepco was advised by the Federal Aviation Agency (the "FAA"), by letter dated February 16, 1962 (JA 4), that the heights of the proposed structures "exceed the criteria of hazards to air navigation in Part 626.13(a)(1) and (b)(2)" of the Regulations (PA 31) and that, consequently, a preliminary determination had been made that the proposed construction would constitute a "hazard to air navigation". The letter further advised Pepco that such preliminary determination would become "final" unless Pepco requested "an *aeronautical* study" (emphasis supplied).

Accordingly, Pepco requested such an aeronautical study by letter dated March 5, 1962 (JA 6). Under date of March 14, 1962, the FAA addressed a memorandum to "All Interested Parties" (JA 7), stating that it had been asked "to determine the effect on *aeronautical activity* which may be created by the . . . proposed construction" (emphasis supplied) and asking that anyone wishing to interpose objections to the proposal file "a separate letter setting forth valid *aeronautical* reasons" (emphasis supplied).

Under date of April 26, 1962 the FAA addressed a memorandum to "All Participants, FAA Airspace Meeting" distributing the agenda for an "Informal FAA Airspace Meeting" to be held on May 15, 1962. Such memorandum (JA 14) said "These meetings give *aviation interests* the opportunity to comment on agenda items proposed for

formal airspace action" (emphasis supplied), and the accompanying agenda item with respect to Pepco's proposed construction (JA 15) said that the FAA "is conducting an *aeronautical* study to determine the effects on airspace utilization" (emphasis supplied) of the Pepco proposal, that the proposal had been circularized "for *aeronautical* comment" (emphasis supplied), and that "*Aeronautical* objections" (emphasis supplied) had been made in response to the circularization (presumably referring to the letters and memoranda appearing at JA 10 through 14).

Subsequently, on May 15, 1962, such "informal airspace meeting" was held by the FAA with the last item discussed being Pepco's proposed construction. A Pepco representative attended and during the course of the meeting it was made clear that the meeting was concerned only with consideration of the possible effect of the proposed construction on aeronautical activities (JA 16).

On October 19, 1962, the Administrator, acting through the Acting Chief of the Obstruction Evaluation Branch of the FAA, issued the Determination (JA 17) of which review is sought in this proceeding. The Determination, after an opening statement to the effect that the Agency had "circularized [Pepco's] proposal for *aeronautical* comment" (emphasis supplied) and had "conducted a study to determine its effect upon the safe and efficient utilization of airspace", found that the proposed structures would render certain Freeway Airport runways unusable, or less useful, and "would have a substantial adverse effect upon aeronautical operations at the Freeway Airport", and determined "that the proposed structure would be a hazard to air navigation". The Determination made no findings whatsoever with respect to the nature of the operations conducted at Freeway Airport, with respect to the public interests involved in the construction of Pepco's proposed facilities and in the operation of the airport, with respect to the relative importance of such

public interests, or with respect to the efficient utilization of airspace.

The Determination also stated (JA 18) that it was "effective" as of its date of issuance and would become "final" 30 days after its issuance unless an appeal were filed under Sec. 626.34 of the Regulations (PA 35), and that, if such an appeal were filed and denied, it would become "final" as of the date of the denial or 30 days after the issuance of the Determination, whichever was later.

On November 16, 1962, Pepco filed with the Administrator, pursuant to such Sec. 626.34, a Petition for Public Hearing (JA 19). Such Petition recited the pertinent facts with respect to Pepco's proposed construction and the public interest therein, and alleged that

"The location, construction, maintenance and operation of said steel tower transmission lines, including the portions thereof in the vicinity of said Freeway Airport, is [sic] essential to the performance by the Petitioner of its public utility obligations, and essential to the furnishing of adequate electric service to the Washington Metropolitan Area, including the many governmental buildings, installations and facilities located therein" (JA 22)

as well as that

"The . . . Determination made no finding or determination as to what action should be taken for the protection of persons and property on the ground or as to what, in the public interest, would be the most efficient utilization of the navigable airspace above the Petitioner's said 250 foot wide right-of-way in the vicinity of said Freeway Airport, and in the making of said Determination no consideration was given to the large public interest affecting the Petitioner's operation as a public utility or to the essential public service nature of the facilities proposed to be constructed, maintained and operated by the Petitioner on its said right-of-way" (JA 23).

The Petition closed with a prayer that a public hearing be conducted on Pepco's proposed construction, pursuant to the Regulations,

"in order to determine, in the light of the over-all public interest, the effect of the proposed construction upon the safety of aircraft and, even more importantly, upon the efficient utilization of the navigable airspace" (JA 23).

On or about November 28, 1962, counsel for the Intervenor proprietors of the Freeway Airport filed with the Administrator an "Answer to Petition for Public Hearing" (JA 24) in which it was asserted that Pepco's Petition "does not show an adequate foundation . . . and such hearing should be denied until an adequate petition is filed", citing Sec. 626.34 of the Regulations (PA 35). Such Answer further stated that

"Unless in some way the proponent [i.e. Pepco] alleges that the results and conclusions reached by the Agency are in error, by alleging that the proposed structures would not violate any of the criteria of 626.12, or that notwithstanding violation of such criteria, such construction would not constitute a hazard, the petition for public hearing does not have adequate foundation, and the hearing should be denied" (JA 25).

Finally, by letter dated February 1, 1963, signed by Lieutenant General Harold W. Grant as Deputy Administrator (JA 26),\* Pepco was advised that "our examination of this matter forces us to deny the petition for a hearing" because "The grounds given . . . do not constitute adequate foundation".

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\* The copy of this letter included in the Record shows General Grant as signing as "Acting" Administrator. The original, received by Pepco, shows him signing as "Deputy" Administrator.

## **STATUTES AND REGULATIONS**

The pertinent statutory and regulatory provisions are set forth in the Petitioner's Appendix (PA 1-43).

### **STATEMENT OF POINTS**

1. If it is not made clear that the Determination cannot affect Pepco adversely, it is reviewable.

2. If the Determination can affect Pepco adversely, its issuance was beyond the statutory authority of the Administrator.

3. If, despite adverse effect on Pepco, the Act authorized the issuance of the Determination, then such issuance was in violation of the Fifth Amendment to the Constitution.

4. If, despite its adverse effect on Pepco, the issuance of the Determination was within the statutory and constitutional authority of the Administrator, then the Administrator erred in issuing the Determination without (i) having extended to Pepco an opportunity to present evidence as to the respective public interests to be served by its proposed facilities and by the airport and (ii) having made appropriate findings as to the efficient utilization of the navigable airspace, supported by substantial evidence of record that the public interest to be served by the air navigation related to the airport is superior to the public interest to be served by Pepco's proposed facilities.

### **SUMMARY OF ARGUMENT**

The Determination is silent as to any specific results flowing from its issuance. Over-all, however, it implies that Pepco's proposed construction is outlawed.

Accordingly, unless the intent of the Determination is clarified by language revision on remand or by judicial holding, the possibility exists that in some future litigation as to Pepco's rights incidental to its proposed use of

its property Pepco will be prejudiced by the Determination, which is alleged by the Administrator to be a "final" one.

In the absence of such clarification the Determination is reviewable by this Court because it may adversely affect Pepco.

Upon review by this Court, the Determination should be found by the Court to be in excess of the statutory authority of the Administrator because (i) it is a regulation of the use of the airspace by non-aeronautical structures, (ii) the airspace to be occupied by the structures is not navigable airspace within the meaning of the Act, and (iii) the structures have not been found to have any potential adverse effect on air commerce, as defined in the Act.

Further, if (despite the normal rule that whenever possible a statute will be construed so as to avoid its unconstitutional application) the Court should find that the issuance of the Determination, although adversely affecting Pepco, was within the Administrator's authority under the Act, then such issuance was in violation of the Fifth Amendment because it effected a taking by the Federal government of property for private, rather than public use, and because the Act forbids the payment of compensation by the Federal government for such taking.

Finally, if the Determination is reviewable because of its adverse effect on Pepco and if, upon such review, the issuance of the Determination is found to have been within the statutory and constitutional authority of the Administrator, then the Administrator erred in such issuance because Pepco was given no opportunity to present evidence, and the Administrator made no finding, with respect to the efficient utilization of the navigable airspace in the light of the over-all public interest, despite the statutory requirement (Sec. 307(a), JA 8) that the Administrator assign the use of the navigable airspace as he may deem necessary, in the light of the public interest, in order to insure the safety of aircraft and the efficient utilization of such airspace.

## ARGUMENT

**THE DETERMINATION IS REVIEWABLE BECAUSE IT MIGHT ADVERSELY AFFECT PEPCO, UNLESS IT IS MADE CLEAR, BY REVISION OF THE DETERMINATION OR BY JUDICIAL PRONOUNCEMENT, THAT IT CANNOT SO OPERATE.**

### **1. The Effect of the Determination on Pepco Is in Doubt.**

The Determination was issued pursuant to Part 626 of the Regulations (14 CFR), as in effect prior to December 12, 1962 (PA 24), which assigns as the authority for its issuance Secs. 104, 307, 313, 1001 and 1101 of the Act.

Briefly, to the extent pertinent, Sec. 104 of the Act (PA 5) recognizes and declares to exist a public right of freedom of transit through the navigable airspace; Sec. 307 (PA 8) directs the Administrator to "assign" the use of the navigable airspace in order to insure the safety of aircraft and the "efficient utilization" of such airspace; Sec. 313 (PA 11) is a general grant of authority to the Administrator to do all things necessary to carry out the provisions of the Act; Sec. 1001 (PA 13) relates to the procedure to be followed by the Administrator in conducting his proceedings; and Sec. 1101 (PA 16) directs the Administrator to require public notice of the proposed construction of any structure where notice will promote safety in "air commerce".

In the preamble to Part 626 (PA 20) it is stated, with reference to comments received from the public in response to the previously published Notice of Rule Making,

"A substantial number of comments were directed to the authority and jurisdiction of the Administrator to adopt a regulation on the subject of the heights of structures . . . A brief reference to our statutory authority should be sufficient here. The Federal Aviation Act continued the recognition and declaration previously made in the Civil Aeronautics Act of the 'public right of freedom of transit through the navigable airspace of the United States'. In addition, the Act

authorizes and directs the Administrator to regulate the use of the navigable airspace in order to insure aircraft safety and efficient utilization and to require notice of the proposed construction or alteration of any structure where such notice would promote air safety. These, and the other authorities referred to in the notice of proposed rule making, provide an ample basis for the regulatory action being taken here. This regulation not only constitutes a proper measure to carry out the purposes of the Act, but, under the circumstances, is required if we are to properly perform the responsibilities and duties entrusted to us by the Congress".

Such preamble also says, with respect to Part 626 as proposed in the Notice of Rule Making, that

"The proposal evoked numerous comments from the aeronautical, television and broadcasting industries as well as railroads, power companies and other utilities, and related manufacturing industries. . . . Due to the complexity of the subject matter of our proposal and *its effect upon diverse non-aviation interests*, a hearing was held . . ." (PA 20, emphasis supplied).

In the same preamble it is also said (PA 22), with reference to comments received with respect to the proposed rule making, that

"... the Agency found itself unable to comply with a request for relaxation of the requirement for additional notice at the time the new construction or alteration is erected to a height which would equal the original criteria. This notice is necessary to permit placing the new structure on charts used in air navigation. *Such charting may not be accomplished on the basis of the initial notice since many proposed structures are never erected*" (emphasis supplied).

The preamble further says (PA 22) that

"The regulation adopted does not *brand* immediately as hazards all proposed construction which would

exceed the criteria but, rather, provides that the *offending* proposal would require only a preliminary determination of hazard, which preliminary determination would expire upon the initiation of an aeronautical study" (emphasis supplied)

and that "The criteria established in the regulation are more *lenient* than those contained in the notice" (emphasis supplied).

The preamble also points out (PA 23) that

"provision is made for the possible adjustment of (1) aviation requirements to accommodate the construction proposals and (2) the location and height of the proposed structures to eliminate or minimize their effects on air navigation. *It is expected that a very large proportion of the conflicts between proposed structures and air navigation for the use of the navigable airspace will be resolved in these informal studies and that a relatively small number will require a hearing*" (emphasis supplied).

Finally, the preamble clearly indicates that the Administrator intends, through Part 626, to play a leading role in fixing the location of broadcasting antennae when it says (PA 23):

"We believe that proper fulfillment of our statutory responsibilities must include *the promulgation of regulations which will lessen the detrimental effect of tall structures on the use of the navigable airspace*. The grouping of antenna structures is, obviously, such a measure. However, much of its beneficial effect could be lost if the farm areas established were not compatible with the over-all needs of the broadcast industry. Accordingly, this portion of our proposal has been revised to include an affirmative requirement that the views of the Federal Communications Commission will be requested before any antenna farm area is established and that *such views will be given full consideration prior to any FAA action*" (emphasis supplied).

Part 626 itself states (PA 24) that its purposes are

- (1) To require persons to give notice of proposed construction;
- (2) To establish criteria for determining whether a proposed structure would be a hazard;
- (3) To provide for aeronautical studies of construction proposals which would exceed the criteria; to determine the effects of such structures upon the safety of aircraft and the efficient utilization of airspace; and to prescribe the manner of issuance of such determinations;
- (4) To provide for public hearings for making "Final Determinations" as to whether specific construction proposals would result in hazards to air navigation;
- (5) To "establish" antenna farm areas at "prescribed" locations with "specified" dimensions of area and height.

Further, Sec. 626.51 of Part 626 (PA 36) says that

"Hearings conducted on the proposed construction or alteration of structures in order to determine the effect of such construction or alteration upon the safety of aircraft and the efficient utilization of the navigable airspace are purely fact-finding in nature and, therefore, are not subject to the provisions of sections 4, 5, 7 and 8 of the Administrative Procedure Act. As a fact-finding procedure, the hearing is non-adversary and there are no formal pleadings or issues and no adverse parties".

In ascertaining the purpose of the Administrator in promulgating Part 626 it is worthy of note that in the "Notice of Proposed Rule Making" which was published in the Federal Register on September 16, 1960 (25 FR 8911)

it is said, with respect to the procedures proposed to be incorporated in Part 626, that

“These procedures will provide a forum and a means for the Agency [i.e. the FAA] to give full consideration to the public interest in safe air commerce and *the interests of the construction sponsor*” (PA 19, emphasis supplied).

As noted above, neither Part 626 nor the sections of the Act under the authority of which the Part was allegedly issued give any clear indication of the purpose, intent or effect of the Determination. Further, Pepco has been unable to obtain from any member of the staff of the FAA any indication as to the purpose, intent or effect of the Determination. In this connection, the statements made by the Administrator on August 25, 1961 in connection with his promulgation of certain “Miscellaneous Amendments” to Part 626 are of considerable interest (PA 39):

“The FAA-FCC discussions underscored the existence of uncertainty in the broadcast industry with respect to the effect on FCC jurisdiction of the Agency findings made subsequent to the hearings held under Subpart D [of Part 626—the type of public hearing denied to Pepco]. These hearings are conducted to determine the effect of proposed structures upon the safety of aircraft and the efficient utilization of the navigable airspace. The findings made form the basis for a determination as to whether a proposed structure would, in fact, result in a hazard to air navigation. *While we regard this determination as a final one on the question of air hazard*, our findings should not be construed to prejudice the exercise by the Commission of its statutory jurisdiction, particularly its authority to determine whether a construction permit for such a structure should be issued. Accordingly, *we are promulgating an expression of our opinion on this point. This conclusion should not be interpreted as an attempt to settle any justiciable rights which may be the subject of later controversy. Any individual who believes an FAA . . . action has deprived him of one*

*or more rights may apply, of course, to the appropriate court for a review and decision on the matter"* (emphasis supplied).

One of the "Miscellaneous Amendments" thus made by the Administrator was the addition to Sec. 626.50 of Part 626 of this note (PA 36):

"NOTE: Any findings entered hereunder are without prejudice to the jurisdiction of the Federal Communications Commission to grant or deny applications for construction permits under the Communications Act of 1934, as amended."

Broadly speaking, there are four possible interpretations that could be given to the Determination in this case:

(1) It might be considered to be merely a tool for use by the Administrator in marking aeronautical charts and otherwise advising flying interests as to the existence of Pepco's structures. However, if that were the purpose of the Determination, it would not appear appropriate for it to open (as it does) with the statement that the FAA has circularized Pepco's proposal for aeronautical comment "and has conducted a study to determine its effect upon the safe and efficient utilization of airspace" (JA 17), since that is the language of Sec. 307(a) of the Act (PA 8), which directs the Administrator to "assign . . . the use of the navigable airspace", and not the language of Sec. 1101 of the Act (PA 16), which merely directs the Administrator to require notice be given him of any construction proposal "where notice will promote safety in air commerce". Further, if that were the purpose of the Determination, it would hardly appear to be necessary to provide the elaborate machinery of preliminary determination, aeronautical study, public hearing and publication in the Federal Register that Part 626 affords. Finally, the preamble to Part 626 (PA 22), as noted above, recognizes that aeronautical charts can't be appropriately marked

until the structure is actually constructed, so that a determination with respect to *proposed* construction (as is involved here) will be useless for chartmarking purposes.

(2) The Determination might be considered (particularly in view of the provisions of Sec. 626.51 of the Regulations [PA 36]) to be simply a finding of fact that the existence of Pepco's structures and the operation of the airport will be incompatible. If that were the intent, however, the Determination would not normally be expected to speak solely of hazards to air navigation, since it is clear that if, in fact, Pepco's facilities will be a hazard to aircraft using the airport then those aircraft will, to the same extent, be a hazard to Pepco's facilities. Further, such a finding of fact would not touch upon the "efficient utilization of the navigable airspace".

(3) Since the Administrator is primarily concerned with the safety of the flying public and since he must be presumed to be aware of his lack of authority over non-aeronautical uses of the airspace (see below), the Determination may have been intended simply as a factual finding of a potential hazard to flying operations at Freeway Airport which, when it becomes a reality, will have to be recognized by the Intervenor proprietors of the airport in determining whether to continue to use the affected runways and thus expose their users to the risks inherent in the existence of the hazard.

(4) The Determination might be intended as a basis for preventing Pepco from, or penalizing Pepco for, erecting the structures which have been determined to be a potential hazard to air navigation.

**2. Its Effect Being in Doubt, It Is Possible That the Determination Might Operate to Affect Pepco Adversely.**

Obviously, it is in Pepco's interest to assert and maintain (as it does) that the Determination cannot in any way prejudice Pepco in its construction, operation and maintenance of its proposed above-ground electric transmission facilities. Indeed, Pepco is convinced, in the light of the lack of authority in the Administrator to control the use of airspace by non-aeronautical interests (see below) that paragraph (3) in subsection 1, above, correctly sets forth the purpose and effect of the Determination.

However, Pepco must be realistic in its appraisal of how the Determination *might* affect it. Central to that problem are these facts:

(1) The Act declares "to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace" (PA 5) and defines "navigable airspace" as including airspace "needed to insure safety in take-off and landing of aircraft" (PA 4).

(2) The Administrator is "empowered and directed to encourage and foster the development of civil aeronautics" (PA 8) and is authorized and directed to "assign by rule, regulation, or order the use of the navigable airspace . . . in order to insure the safety of aircraft and the efficient utilization of such airspace" (PA 8), and the Determination opens with the statement that the FAA "has conducted a study to determine [the] effect [of Pepco's proposal] upon the safe and efficient utilization of airspace" (JA 17). It closes with the statement that it "is *effective* as of the date of issuance and will become *final* 30 days thereafter unless an appeal is filed" (JA 18, emphasis supplied).

(3) The Administrator has adopted lengthy and very detailed Regulations (PA 24) providing for the issuance and

becoming "final" of determinations such as the one here involved (which are then formally published in the Federal Register), which regulations in very large part go beyond the simple statutory requirement of the Act that "The Administrator shall . . . require all persons to give adequate public notice . . . of the construction or . . . proposed construction . . . of any structure where notice will promote safety in air commerce" (PA 16).

(4) The Regulations and their preamble (PA 20) suggest that a determination that a proposed structure will constitute a hazard to air navigation is intended to be adverse to such structure. For example, the preamble says that "Due to the complexity of the subject matter . . . and *its effect upon diverse non-aviation interests*, a hearing was held" (PA 20, emphasis supplied), that

"A substantial number of comments were directed to the authority and jurisdiction of the Administrator to adopt a *regulation on the subject of the heights of structures* . . . A brief reference to our statutory authority should be sufficient . . . [T]he Act authorizes and directs the Administrator to regulate the use of the navigable airspace in order to insure aircraft safety and efficient utilization . . ." (PA 21)

and that the Administrator believes "that proper fulfillment of our statutory responsibilities must include the promulgation of regulations which will lessen the detrimental effect of tall structures on the use of the navigable airspace" (PA 23). Further, it says that the Regulations do not "brand" immediately as hazards all proposed construction which would exceed the criteria but, rather, provide that the "offending" proposal would require only a preliminary determination of hazard which would expire upon the initiation of an aeronautical study (PA 22). In general, whether intentionally or otherwise, the entire wording of the preamble and the Regulations is such as to leave the reader with the definite feeling that a structure

which has been determined to be a hazard to air navigation is one which the Administrator has found to be improper and has outlawed.

Even if the Determination is not intended to have any adverse effect on Pepco, nevertheless, in the light of those facts, it is only realistic to recognize that at some time in the future some court *might* give weight to the Determination adverse to Pepco in an action, for example, brought to enjoin Pepco from constructing or maintaining its proposed transmission facilities, or one brought against Pepco to recover for damages suffered by a flyer as a result of his airplane coming into contact with Pepco's facilities\*, or one brought by Pepco for damages suffered by Pepco as a result of an airplane coming into contact with its facilities.

**3. If the Determination Adversely Affects Pepco, It Is Reviewable. If Such Effect Is Not Intended, the Possibility of Adverse Effect Should Be Avoided by a Revision of the Language of the Determination or by a Judicial Pronouncement Making Clear That It Cannot Have Adverse Effect on Pepco.**

In essence, the question of whether the Determination is reviewable depends on whether it adversely affects Pepco. This is in doubt, although it is clear that the general tenor of the Determination, and the Regulations under which it was issued, is such as to suggest to the reader that the proposed structures have been outlawed. Since it is wholly possible that in the future some court might choose to give such an outlawing effect to the Determination, it must follow that Pepco is presently adversely affected by the Determination.

If it should be held that the Determination is not reviewable because the damage to Pepco is presently un-

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\* See, for examples of such actions brought by flyers, *Strother v. Pacific Gas & Elec. Co.* (Dist. Ct. App., 1949), 94 Cal. App. 2d 525, 211 P. 2d 624, and *La Com v. Pacific Gas & Elec. Co.* (Dist. Ct. App., 1955), 132 Cal. App. 2d 114, 281 P. 2d 894.

known and cannot be known until some action is taken by some court in the future, Pepco would thereby be effectively denied any opportunity to attack the Determination as unauthorized or lacking in procedural due process, since, it having become "final", it would not be open to collateral attack. See, for example, *Frozen Food Express v. U.S.* (1956), 351 US 40, 45; 100 L. ed. 910, 915; 76 S. Ct. 569, 571, where the Interstate Commerce Commission argued for the finality of the order under review and it was held to be reviewable, as compared with *U.S. v. Los Angeles & S.L.R. Co.* (1927), 273 US 299, 71 L. ed. 651, 47 S. Ct. 413, where the statute made it clear that the order as to which review was denied was not a final one.\*

If the Determination adversely affects Pepco, judicial review should be granted. If, on the other hand, it is not intended adversely to affect Pepco, then the possibility that it might, in the future, have an adverse effect on Pepco should be avoided either by this Court's holding, in a published opinion denying judicial review, that the Determination cannot be deemed in any way adversely to affect Pepco's rights, or by this Court's remanding the Determination to the Administrator with instructions either to revoke and rescind the Determination or to amend it so as to include in it appropriate language to the effect that it is not intended, and shall not be deemed, to affect in any way any rights which Pepco would otherwise have with respect to the construction, maintenance and operation of above-ground electric transmission facilities on its fee-owned property.

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\* See also *Joint Anti-Fascist Refugee Committee v. McGrath* (1951), 341 U.S. 123, 140, 95 L. ed. 817, 837, 71 S. Ct. 624, 632, where the Court said:

"The touchstone to justiciability is injury to a legally protected right. . . . It is unrealistic to contend that because the respondents gave no orders directly to the petitioners to change their course of conduct, relief cannot be granted. . . . We long have granted relief to parties whose legal rights have been violated by unlawful public action, although such action made no direct demands upon them."

**II. IF THE DETERMINATION ADVERSELY AFFECTS PEPKO, ITS  
ISSUANCE EXCEEDED THE STATUTORY AUTHORITY OF THE  
ADMINISTRATOR.**

- 1. The Act Does Not Vest the Administrator with Power to  
Assign the Use of Navigable Airspace by Non-Aeronautical  
Structures.**

Sec. 307(a) of the Act (PA 8) provides that

“The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and to assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.”

and is the section primarily relied on by the Administrator as the authority for Subparts C and D of Part 626 of the Regulations (PA 32), dealing with the determination of the effect of proposed structures upon the use of navigable airspace. Senate Report No. 1811, dated July 9, 1958, says, after discussing the confusion, under the then existing statutory and regulatory set-up, as to what agency should control the use of the airspace:

“The [Act] proposes to clear away this ambiguity once and for all by vesting unquestionable authority for all aspects of airspace management in the Administrator of the new Agency. The ‘heart’ of the . . . Act is contained in section 307(a) . . .” (PA 52).

If the Determination can have an adverse effect on Pepco's rights to erect its public service facilities on its fee-owned lands, the authority for its issuance must be found in Sec. 307(a). It is our contention that a reading of the Act as a whole, and a study of its legislative history, make it abundantly clear that no such authority is given to the Administrator by that section.

Basic to a consideration of the meaning of the Act on this point is the realization that if the Congress intended to vest in the Administrator, an agent of the Executive Department chosen primarily for his expertise in aeronautical matters\*, the power to control the use and occupancy of any portion of the airspace by non-aeronautical, land-based structures, that purpose and intent would strike so deeply at our fundamental concepts of the rights of real property ownership that it should and could only be found to exist if expressed in clear, unambiguous and reasoned terms. It could, potentially, adversely affect every owner of land in the nation and subject all surface uses to the prior and privileged use by aircraft of the airspace superjacent to the surface. As the Supreme Court, citing *U. S. v. Causby* (1946), 328 U.S. 256, 90 L. ed. 1206, 66 S. Ct. 1062, said, in *Griggs v. Allegheny County* (1962), 369 U.S. 84, 88, 7 L. ed. 2d 585, 588, 82 S. Ct. 531, 533:

“But as we said in the *Causby* case, the use of land presupposes the use of some of the airspace above it. 328 U.S., at 264. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the ‘superadjacent airspace’ will often ‘affect the use of the surface of the land itself.’ 328 U.S., at 265.”

We submit that it is inconceivable that Congress intended to vest such a drastic and far-reaching power in the Administrator. Rather its intent was to vest in the Administrator power and responsibility to control *aeronautical* uses of the navigable airspace. This, we believe, is made clear by the Act itself and by its legislative history:

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\* Both the Administrator and his Deputy are required to be persons who “have had experience in a field directly related to aviation”. Secs. 301(b) and 302(b) of the Act (PA 6 and 7).

(1) The language of the Act:

The Act is entitled (PA 1)

“An Act to . . . provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft”

and is thus one primarily concerned with the safe and efficient use of airspace *by aircraft*. Only negatively (in the sense that use of airspace by a land-based structure prevents its use by aircraft) does the title of the Act even impliedly indicate that it deals with the use of airspace by non-aeronautical structures.

Sec. 103(c) (PA 5)—In exercising and performing his powers and duties the Administrator shall consider to be in the public interest “The control of the use of the navigable airspace . . . and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both”.

Sec. 301(b) (PA 6)—“The Administrator shall have no pecuniary interest in or own any stock in or bonds of any *aeronautical* enterprise . . .” (emphasis supplied). If the Congress had intended him to control airspace use by non-aeronautical interests, assuredly it would have broadened this provision to cover financial interest in public utilities, broadcasting companies and industries generally, for example. See also Sec. 302(b) (PA 7) making the same requirement as to the Deputy Administrator.

Sec. 303(a) (PA 7)—“The Administrator is empowered to make . . . expenditures for . . . (5) membership in and cooperation with such organizations as are related to, or are part of, *the civil aeronautics industry or the art*

of aeronautics . . . (7) making investigations and conducting studies in *matters pertaining to aeronautics . . .*" (emphasis supplied). Surely, if Congress had intended him to control non-aeronautical uses of airspace, it would have empowered him to make expenditures to investigate and study those uses.

Sec. 305 (PA 8)—"The Administrator is . . . directed to encourage and foster the development of civil aeronautics and air commerce . . ." If Congress had envisioned the Administrator as a controller of both aeronautical and non-aeronautical uses of the airspace, it would not have "*directed*" him "*to encourage and foster . . . civil aeronautics and air commerce*" (emphasis supplied) without a balancing directive to consider and weigh the interests of non-aeronautical users.

Sec. 307(a) (PA 8)—"The Administrator is . . . directed to develop plans for and formulate policy with respect to the use of the navigable airspace". If such development and formulation were intended to cover non-aeronautical as well as aeronautical uses of the navigable airspace, it would be a very large order, indeed, and one which would tread directly on the toes of many State and Federal agencies.

Sec. 307(b) (PA 8)—This section, following directly after the apparently (to the casual eye) very broad authority to control *all* uses of the navigable airspace given in Sec. 307(a), is limited to authority over aeronautical matters—which, under normal rules of construction, would appear to limit the seemingly broad authority given in 307(a).

Sec. 307(c) (PA 8)—This section, again, is narrowly confined to "air traffic rules and regulations" to be prescribed for, among other things, "the protection of persons and property on the ground, and for the efficient utilization

of the navigable airspace". We submit that Congress must have intended it to mean "for the efficient aeronautical utilization of the navigable airspace", since the section is directed only to "air traffic rules and regulations".

Sec. 308(b) (PA 10)—This section, "In order to assure conformity to plans and policies for allocations of airspace by the Administrator under section 307", forbids the establishment of any military airport unless prior notice is given to the Administrator so that he may advise "as to the effects of such . . . establishment . . . on *the use of airspace by aircraft*" (emphasis supplied). This strongly indicates that Sec. 307 "allocations" of "the use of the navigable airspace" are intended to be "allocations" of the *aeronautical* use of such airspace.

Sec. 309 (PA 10)—Here, again, the Administrator is to be notified of the proposed establishment of non-Federally financed airports "so that he may advise as to the effects of such construction on *the use of airspace by aircraft*" (emphasis supplied). Under this section, if the proprietors of Freeway Airport proposed to substantially alter a runway layout they would be required to give the Administrator advance notice so that he could advise as to the effects of such alteration "on the use of airspace by aircraft", but he would not be required to advise as to the effect on non-aeronautical uses of the airspace.

Sec. 312(a) (PA 11)—This Section in large part restates the first clause of Sec. 307(a), but with enlightening variations. Here the Administrator is directed to make "plans for and formulate policy with respect to the orderly development and use of the navigable airspace, and the orderly development and location of . . . aids and facilities for air navigation, as will best meet the needs of, and serve the interest of civil aeronautics and national defense . . ." Under this directive, his only concern is as to what "will best meet the needs of, and serve the interest of civil aero-

navitics and national defense", so that if his control of the use of the navigable airspace included the control of non-aeronautical uses he would, in effect, by this section be directed to pay no heed whatsoever to the "needs" and "interest" of such non-aeronautical uses. Surely, Congress cannot have intended any such directive as that.

(2) The legislative history of the Act:

Under date of June 13, 1958, President Eisenhower addressed a message to the Congress (see Appendix A to Senate Report No. 1811, July 9, 1958) recommending "the establishment of an aviation organization in which would be consolidated among other things all the essential management functions necessary to support the common needs of our civil and military aviation" (PA 55). Such message indicated that "Recent midair collisions of aircraft" (PA 55) were the compelling events which gave rise to the message. It stated that "A fully adequate and lasting solution of the Nation's air traffic management problems will require a unified approach to the control of aircraft in flight and the utilization of airspace" (PA 55) and concluded with these two recommendations (PA 56):

"I recommend that the Federal Aviation Agency be given full and paramount authority over *the use by aircraft of airspace* . . . .

"To assure maximum conformance with the plans, policies and allocations of the Administrator with respect to airspace, I recommend that the legislation prohibit the construction or substantial alteration of any airport . . . until prior notice has been given to the Administrator and he is afforded a reasonable time to advise as to the effect of such construction *on the use of airspace by aircraft*" (emphasis supplied).

Senate Report 1811 reviews the need for the legislation and says (PA 50) "the most urgent need in aviation today is for the prompt development and institution of a system

of *air-traffic control* which will insure the utmost degree of safety for all *airspace users*, civil and military alike" (emphasis supplied). It then discusses further the need for "Plenary airspace control" (PA 52) and the provisions of Section 307(a) (which, as noted above, it calls the "heart" of the Act) and then says, as to "Airport site control" (PA 54):

"Effective airspace management and planning is not a matter involving airborne craft alone. As a natural corollary it also involves the location of new airports, missile sites, etc., whose landing patterns or other airspace requirements may conflict with the present usage of airspace".

It is highly significant that neither here nor anywhere else in Senate Report 1811 is there any mention of airspace management and control as having any possible effect on non-aeronautical uses of the airspace, thus indicating clearly that the Committee, in reporting out the bill, did not conceive of it as having any impact on such non-aeronautical uses.

Appendix B to Senate Report 1811 indicates (PA 57) that the bill as reported out by the Committee conforms to the Presidential recommendation that the FAA "be given full and paramount authority over the use by aircraft of airspace" and suggests in no way that such authority has been broadened in the bill to include the use of airspace by land-based structures.

House Report No. 2360, dated August 2, 1958, also is silent with respect to any thought that the Act is intended to give the Administrator controlling authority over non-aeronautical uses of the airspace. Under "Purpose of Legislation" the Report says (PA 59):

"The principal purpose of this legislation is to establish a new Federal agency with powers adequate to

enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations.

“The Administrator . . . (2) would be charged with the management of the national airspace, including responsibility for establishing and enforcing air traffic rules and for the development and operation of air-navigation facilities . . . .

“The [FAA] would be headed by a civilian Administrator with plenary authority to—

“(a) *Allocate airspace and control its use by both civil and military aircraft;*

“(b) Make and enforce air traffic rules for both civil and military aircraft;

“(c) Develop and operate a common system of air navigation facilities for both civil and military aircraft;

“(d) Make and enforce safety regulations governing the design and operation of civil aircraft.” (emphasis supplied).

When the bills which ultimately became the Federal Aviation Act of 1958 were originally introduced in the Congress they did not contain what is now Sec. 307(a). Instead, they were drafted to amend Sec. 302(a) of the Civil Aeronautics Act of 1938, which then read, in part

“The Administrator is authorized and directed to designate and establish such civil airways as may be required in the public interest . . . .”

so that such section would read

“The Administrator is authorized and directed to control the use of the airspace of the United States, including the designation of Federal airways as may be required in the public interest . . . .”

Notwithstanding this proposed amendment, and other related proposed amendments which referred to “plans and

policies for, and allocations of, airspace by the Administrator", Senator Monroney, in opening the hearings on the Senate Bill (S. 3880) before the Subcommittee on Aviation of the Committee on Interstate and Foreign Commerce on June 4, 1958, described the bill as one "to provide for the safe and efficient use of airspace by both civil and military aircraft" and said that

"The principal provisions of the bill may be generally summarized as follows:

"1. It creates a Federal Aviation Agency . . .

"2. It gives the Administrator the authority to regulate the use of all airspace . . . by both civil and military aircraft . . . ."

Similarly, Congressman Harris, in opening the hearings on the companion House Bill (H.R. 12616) on June 24, 1958, before the Subcommittee on Transportation and Communications of the Committee on Interstate and Foreign Commerce, described the bill as being one "to regulate the use of all airspace . . . by all aircraft, civil and military".

In sum, it is clear that nowhere in the legislative history of the Act is there the slightest indication that the Congress intended to give, or thought that it was giving, to the Administrator any authority or directive to control non-aeronautical uses of the navigable airspace. All concerned seemed in agreement that the only interests involved in the question of the control and allocation of the airspace were aeronautical interests. The Chairman of the Civil Aeronautics Board, who opposed many of the provisions of the Act dealing with the participation of the military in its administration, said (PA 72):

"The Defense Establishment is the largest and one of the most important users of the airspace. S. 3880 [i.e. the Act] ignores the fact that there are other important users such as the certificated air carriers, the supplemental carriers, general aviation, and the private flyer who are also vitally concerned with the allocation of airspace."

but he did not suggest in any way that public utilities or broadcasting companies or large industrial companies might be "vitally concerned with the allocation of airspace".

Accordingly, we submit, on the basis of the internal evidence in the Act as well as its legislative history, that Congress intended that Section 307(a) of the Act should be read substantially thus:

"The Administrator is authorized and directed to develop plans for and formulate policy with respect to the *aeronautical* use of the navigable airspace; and assign by rule, regulation, or order the *aeronautical* use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient *aeronautical* utilization of such airspace. He may modify or revoke such assignment when required in the public interest" (emphasized words supplied).

**2. Airspace Required for Landings and Takings-Off at Freeway Airport Is Not "Navigable Airspace" and Hence Its Use Is Not Subject to Assignment by the Administrator.**

Sec. 104 of the Act (PA 5) recognizes and declares to exist in behalf of each citizen a public right of freedom of transit through the navigable airspace of the United States, and Sec. 101(24) (PA 4) defines "navigable airspace" to include "airspace needed to insure safety in take-off and landing of aircraft". But the Supreme Court, in *Griggs v. Allegheny County*, above, held that even though Congress had thus placed the navigable airspace, as defined, in the "public domain" nevertheless "the use of land presupposes the use of some of the airspace above it" and that, therefore, when the exercise of the "public right of freedom of transit through the navigable airspace" prevents the owner of the subjacent land from making use of the land for lawful purposes, there is a taking, in the constitutional sense, for which just compensation must be paid. The Court further, and most importantly, held that the party doing the taking is the airport which invites and per-

mits the landing and taking-off of aircraft. Thus, if aircraft landing and taking-off at Freeway Airport can, under the Act, preempt the use of the airspace superjacent to Pepco's land, and thus prevent Pepco from making its desired lawful use of such land, there would, under *Griggs*, be a constitutional taking of Pepco's property *by the airport* for which Pepco must be compensated *by the airport*. We submit that the Act should not and cannot be construed to authorize such a preemption.

In *Griggs* the airport was owned and operated by a political subdivision having the power of eminent domain and was dedicated to public use in conformity with the rules and regulations of the Civil Aeronautics Administration within the scope of the National Airport Plan provided for in the Federal Airport Act (Act of May 13, 1946, c. 251, 60 Stat. 170, as amended, 49 USC §§1101-1119). Further, the airport there involved was financed in part by Federal funds, with the allowable costs payable by the Federal government including "costs of acquiring land or interests therein or easements through or other interests in air space . . ." (49 USC §1112(a)(2)). Here, Freeway Airport is privately owned and operated and has none of those characteristics.

The Federal Aviation Act sharply recognizes the distinction between Federally financed airports and other airports. Sec. 308(a) (PA 10) forbids the expenditure of Federal funds on any landing area or airport "except upon written recommendation and certification by the Administrator that such landing area or facility is reasonably necessary for use *in air commerce* or in the interests of national defense" (emphasis supplied). As to airports not involv-

ing expenditure of Federal funds, the Act (Sec. 309, PA 10) merely states that they shall not be established or constructed "unless reasonable prior notice thereof is given the Administrator . . . so that he may advise as to the effects of such construction on the use of airspace by aircraft". Further, in the case of a privately owned and operated airport, not Federally financed in whole or in part, there is no requirement that "there shall be no exclusive right for the use" of such airport, as is true, under Sec. 308(a) of the Act (PA 10), with respect to Federally financed airports.

Accordingly, since exercise of the public right of transit through the lower reaches of the navigable airspace, superjacent to land owned by another, which are needed for landings and takings-off will frequently affect the surface owner's use of his land and thus effect a taking in the constitutional sense for which, under *Griggs*, just compensation must be paid *by the airport*, and since a privately owned and operated airport, such as Freeway, does not have the power of eminent domain and may not have the financial resources required to pay the constitutionally required just compensation (because it does not have access to Federal or other public funds), we submit that in the definition of "navigable airspace" the phrase "airspace needed to insure safety in take-off and landing of aircraft" must be interpreted to mean "airspace needed to insure safety in take-off and landing of aircraft at publicly-owned or Federally financed landing areas having the power of eminent domain".

Congress has evidenced deep interest in the establishment and successful operation of an adequate number of "public airports" as defined in the Federal Airport Act

(Act of May 13, 1946, c. 251, 60 Stat. 170, as amended, 49 USC §§1101-1119) and the International Aviation Facilities Act (Act of June 16, 1948, c. 473, 62 Stat. 450, as amended, 49 USC §§1151-1160), but it has nowhere evidenced the same interest in the establishment and successful operation of privately owned and operated airports. To assume that it intended, by the Act's definition of navigable airspace, to give to every private individual who wishes to establish a landing strip on his property the right to control his neighbor's use of his property is to assume that Congress intended to vest the right of eminent domain in each such landing strip proprietor even though his facility has not been found to be "reasonably necessary for use in air commerce or in the interests of national defense" (Sec. 308(a) of the Act, PA 10)—a proposition not only patently unbelievable but also patently unconstitutional, since the sovereign power of eminent domain, historically and constitutionally, can be delegated only to those whose operations are vested with a public interest.\*

Further support, of a negative nature, for the conclusion that the right of transit through the airspace below the minimum altitudes of flight prescribed by regulation is intended to be given only in connection with landings and

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\* See *Madisonville Traction Co. v. St. Bernard Mining Co.* (1905), 196 U.S. 239, 251; 49 L. ed. 462, 467; 25 S. Ct. 251, 256, where the Court said:

"There ought not to be any dispute, at this day, in reference to the principles which must control in all cases of the condemnation of private property for public purposes. It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. . . ."

See also *Cline v. Kansas Gas and Electric Co.* (1958), 260 F. 2d 271, 273, where the Tenth Circuit said:

"... It is a principle firmly imbedded in the field of fundamental law that the power to appropriate private property for public use is an attribute of sovereignty. But . . . the legislature may delegate such right to another, provided that the property is to be devoted to public use, that there is public necessity that it be taken for such use, and that provision is made for the payment of just compensation. . . ."

takings-off at publicly owned or Federally financed airports having the power of eminent domain is found in the legislative history of the Act. Nowhere in such history is there any suggestion that Congress intended to give such right, or the right of eminent domain, to privately owned and operated airports.

If it be argued that *Griggs* must be limited to its facts, i.e. to a holding that when the airport involved is publicly owned then the taking is by the airport, and that it is not determinative of the party doing the taking when the airport is privately owned and operated with no public service obligations, this must lead to the conclusion that in the case of a privately owned and operated airport the taking of property needed for landings and takings-off is done by the Federal government which must, therefore, provide, from the public treasury, the just compensation to which the injured landowner is constitutionally entitled. But that would result in the expenditure of Federal funds to acquire a right for the benefit of a private person having no public service obligations or duties and whose airport the Administrator has not certified to be "reasonably necessary for use in air commerce or in the interests of national defense". Such expenditure would be violative of Sec. 308(a) (PA 10), when read in conjunction with Sec. 303(c) (PA 7), and would, in addition, be an unconstitutional taking of the injured landowner's property since it would not be for a public purpose as required by the Fifth Amendment to the Constitution.

In sum, then, it must be concluded that the "navigable airspace" does not include "airspace needed to insure safety in take-off and landing of aircraft" at airports which are not publicly owned or Federally financed and do not have the power of eminent domain, and that, therefore, the Administrator does not have statutory authority under Sec. 307(a) of the Act to "assign" the use of airspace superjacent to lands in the vicinity of a private air-

port, not having the power of eminent domain, through which planes must fly in order to land and take-off at such airport, since such right of assignment is applicable only to navigable airspace. Accordingly, the Determination was clearly in excess of the Administrator's statutory authority.

**3. Pepco's Proposed Structures Will Not Affect "Air Commerce" and Hence the Determination Is Beyond the Administrator's Statutory Authority.**

Constitutionally, the Act and the orders issued thereunder by the Administrator can regulate civil aeronautics only to the extent that such aeronautics involve or affect interstate or overseas or foreign commerce and, assuming that the Act gives the Administrator the power to regulate non-aeronautical uses of the navigable airspace (which we deny), can regulate non-aeronautical uses of the airspace only to the extent that such uses affect interstate or overseas or foreign commerce. This is recognized in the Act when, in Sec. 1101 (PA 16), it directs the Administrator to require all persons to give notice of the construction or alteration, or proposed construction or alteration, of any structure "where notice will promote safety in *air commerce*" (emphasis supplied), with "air commerce" and "interstate, overseas or foreign air commerce" (Secs. 101(4) and (20), PA 1 and 2) being defined so as to exclude purely intrastate commerce. Further, there is excluded from "air commerce" by such Sec. 101(20) any interstate, overseas or foreign flights which do not involve carriage "for compensation or hire" or carriage of mail or "operation or navigation . . . in the conduct or furtherance of a business or vocation".

The Determination contains no finding that aircraft using Freeway Airport are engaged in air commerce or that the operations of the airport affect air commerce in any way, and in the absence of such a finding, based on substantial evidence (as to which there is none in the Record), it must

be assumed that the airport, being privately owned and operated, is solely concerned with air operations not subject to the jurisdiction of the Administrator under the Act.\* While such non-jurisdictional air operations might, it is true, affect "air commerce" to the extent they were carried on, it is clear that if they were not carried on they could have no effect on "air commerce". Thus, if Pepco's proposed structures were to prevent or interfere with certain of such non-jurisdictional air operations, as the Determination states will be the case, Pepco's structures would not thereby have any effect on "air commerce".

Accordingly, the Determination, if it adversely affects any of Pepco's rights to use its fee-owned real property for its proper public utility purposes, was in excess of the Administrator's powers under the Act, which are limited to the regulation of air commerce, as defined, and aeronautical and other activities affecting that air commerce.

**III. THE DETERMINATION, IF IT ADVERSELY AFFECTS PEPCO AND IS NOT IN EXCESS OF THE ADMINISTRATOR'S STATUTORY AUTHORITY, IS INVALID BECAUSE ISSUED IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION.**

If the Determination operates to affect Pepco adversely by depriving it of some of the rights which it would otherwise have in connection with the use of its fee-owned real property for the construction, operation and maintenance thereon of its above-ground electric transmission facilities, such deprivation would, under the authority of *Griggs v. Allegheny County*, above, amount to a "taking" of

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\* *Yonkers v. U.S.* (1944), 320 U.S. 685, 88 L. ed. 400, 64 S. Ct. 327; *Atchison, T. & S.F. E. Co. v. U.S.* (1935), 295 U.S. 193, 79 L. ed. 1382, 55 S. Ct. 748; *Panama Refining Co. v. Ryan* (1935), 293 U.S. 388, 79 L. ed. 446, 55 S. Ct. 241.

those rights. And, since Freeway Airport does not have the power of eminent domain, such taking would necessarily have to be by the Federal government. If the Act is construed to authorize the issuance by the Administrator of the Determination with that effect, then, we submit, the "taking" which results from the issuance of the Determination is an unconstitutional one, violating the Fifth Amendment, because

(1) The taking is for private use and not for public use; and

(2) The statute forbids the expenditure of Federal funds to compensate Pepco for the property taken.

It is axiomatic that in order for a taking of private property by the Federal government to be constitutional it must be a taking for public use, as distinguished from private use\*. Here, the Freeway Airport is a privately owned and operated enterprise which has not been found to be vested with any public interest. And the purpose of the Determination (assuming, as we are for purposes of argument, that it adversely affects Pepco) is to assist Freeway Airport in its use of certain of its runways. Thus, the Determination serves no governmental or public purpose and benefits only private individuals, so that the taking is for a private rather than a public use.

Similarly, it is fundamental that under the Fifth Amendment ("nor shall private property be taken for public use, without just compensation") the Federal government can take private property, even for public use, only when just compensation can be obtained from the government by the affected property owner.

If a statute authorizes a taking for a public purpose, but is silent as to a procedure for providing compensation, there are statutory provisions of general application which

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\* See cases cited, page 32, above.

make it possible for the injured party to obtain such compensation. See *United States v. Causby* (1946), 328 U.S. 256, 90 L. ed. 1206, 66 S. Ct. 1062, and 28 USC §1491, providing that

“The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”

But here the Act specifically forbids the expenditure of Federal funds in aid of an airport such as Freeway. Sec. 308(a) (PA 10) reads

“No Federal funds, other than those expended under this Act, shall be expended, other than for military purposes . . . for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area . . . except upon written recommendation and certification by the Administrator that such landing area . . . is reasonably necessary for use in air commerce or in the interests of national defense . . . .”

and Sec. 303(c) (PA 7) says that

“The Administrator, on behalf of the United States, is authorized, where appropriate . . . (2) within the limits of available appropriations made by the Congress therefor, to acquire by purchase, condemnation, lease, or otherwise, real property or interests therein, including, *in the case of air navigation facilities (including airports) owned by the United States and operated under the direction of the Administrator*, easements through or other interests in airspace immediately adjacent thereto and needed in connection therewith . . .” (emphasis supplied).

Freeway Airport has received no such certification and is neither owned by the United States nor operated under

the direction of the Administrator. No other section of the Act authorizes the expenditure of Federal funds for the acquisition of property right such as are here involved.

The above considerations are of particular persuasiveness in reaching the conclusion that Congress, in enacting the Act, did not intend the "navigable airspace" to include that necessary for landings and takings-off at privately owned and operated airports. In addition, however, such considerations inevitably lead, we submit, to the conclusion that if the Determination adversely affects Pepco and is authorized by the Act, then its issuance was in violation of the Fifth Amendment.

**IV. THE DETERMINATION, IF IT ADVERSELY AFFECTS PEPKO AND IS NOT IN EXCESS OF THE ADMINISTRATOR'S STATUTORY AND CONSTITUTIONAL AUTHORITY, IS INVALID BECAUSE PEPKO WAS NOT PERMITTED TO PRESENT EVIDENCE, AND THE ADMINISTRATOR MADE NO FINDING, WITH RESPECT TO THE EFFICIENT UTILIZATION OF THE CONCERNED AIRSPACE.**

If the Determination adversely affects Pepco, and if it is not in excess of the Administrator's statutory and constitutional authority (both of which conditions we deny), the proceedings leading to its issuance must meet the requirements of the Act.

Since Sec. 307(a) of the Act (PA 8) is the only section which even purports to authorize the Administrator to "assign . . . the use of the navigable airspace", we must look to that section to ascertain the statutory requirements with respect to the issuance of the Determination. It directs the Administrator to make the assignment "under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and *the efficient utilization of such airspace*" (emphasis supplied). Further, the section says that the Administrator "may modify or revoke such assignment when required *in the public interest*" (emphasis supplied).

Thus, the Administrator is required, in choosing between competing aeronautical and non-aeronautical uses of the navigable airspace, to decide, in the light of the public interest, which of such uses is preferable from the stand-points of (i) insuring the safety of aircraft and (ii) making the most efficient use of such airspace.

Here the Administrator was faced with two incompatible uses. One was the use of the airspace superjacent to Pepco's land for light aircraft landing and taking-off at a privately owned and operated airport which had not been found to be affected with any public interest. The other was the use of such airspace for land-based public utility structures "essential to the performance . . . of . . . public utility obligations, and essential to the furnishing of adequate electric service to the Washington Metropolitan Area" (JA 22). The Administrator's statutory task was to choose between those uses, having in mind the public interest, for the purpose of best achieving the safety of aircraft and the efficient use of the airspace.

The statutory language, we submit, requires the Administrator, in making his choice and ultimately "assigning" the use of the airspace, to weigh *all* the interests involved and not merely the aeronautical interests. He is required to receive evidence, and to make findings rooted in such evidence, with respect to both the aeronautical and non-aeronautical factors present.

That this is so was recognized by the Administrator in the Notice of Proposed Rule Making which preceded the adoption of Part 626 of the Regulations. There the Administrator said, with reference to the proposed rule:

" . . . In the development of the proposed criteria [for determining the existence of hazards], the Agency has given consideration to the requirements for safety in air commerce and at the same time recognition to the requirements of the users of airspace for surface construction.

"... the regulation also provides procedures for giving individual consideration to a specific structure to permit the Agency to determine whether waiver of the criteria as applied to that structure would be consistent with safety of air commerce. These procedures will provide a forum and a means for the Agency to give full consideration to the public interest in safe air commerce and the interests of the construction sponsor" (PA 19).

Thus in proposing his Regulations the Administrator seemed to recognize that the non-aeronautical interests were to be considered as well as the aeronautical. But in the Regulations themselves no such recognition is given. In fact, Sec. 626.33 of the Regulations as in effect prior to December 12, 1962 (PA 34) says that the Administrator will evaluate each construction proposal only "as to its effect upon the safe and efficient utilization of airspace *by aircraft*" (emphasis supplied) and Sec. 77.37 of the Regulations as made effective December 12, 1962 (PA 41) says substantially the same thing.

Further, from the Record (JA 4-27) it is clear that in applying the Regulations in this case no consideration whatsoever was given to the non-aeronautical public interest in the performance by Pepco of its public service obligations. The opening paragraph of the Determination (JA 17) states, it is true, that the FAA "has conducted a study to determine [the effect of Pepco's proposal] upon the safe and efficient utilization of airspace", but nowhere in the Determination is any finding made as to such "efficient utilization". In fact the only finding made is that "the proposed structure would have a substantial adverse effect upon aeronautical operations at the Freeway Airport". Obviously, such a finding was supported by the evidence which was considered (although such evidence would equally well support a finding that the operation of the airport would have a substantial adverse effect on Pepco's proposed use of its land), but neither that evidence

nor the finding tell us anything as to why, in insuring the efficient utilization of the navigable airspace, Freeway Airport's private operations should be preferred over Pepco's public service activities.

In its petition to the Administrator for a public hearing (JA 22) Pepco alleged that

"The location, construction, maintenance and operation of [Pepco's] steel tower transmission lines . . . in the vicinity of said Freeway Airport, is [*sic*] *essential* to the performance by [Pepco] of its public utility obligations, and *essential* to the furnishing of adequate electric service to the Washington Metropolitan Area, including the many governmental buildings, installations and facilities located therein" (emphasis supplied)

and the Administrator, by denying the petition because "The grounds given . . . do not constitute adequate foundation for the granting of a hearing" (JA 26), must be deemed to have admitted, for the purposes of this review proceeding, the correctness of such allegations of public service essentiality.

If the Administrator had authority to make a determination which would, or could, operate to outlaw Pepco's facilities, then assuredly he was required to receive evidence, and make findings, with respect to the conflicting aeronautical interest in the airport's operations and the non-aeronautical interest in the existence and operation of those Pepco facilities before he could lawfully decide as to the "efficient utilization" of the airspace for the use of which Pepco and the airport are in competition.

Apparently, the Administrator interprets the language of Sec. 307(a) of the Act, directing him to

" . . . assign . . . the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace" (PA 8)

as meaning that whatever action he takes shall be such as to permit aircraft to operate safely. Thus, when in this case he was faced with two completely incompatible uses of a particular portion of the airspace (i.e. the airspace to be occupied by Pepco's facilities), either of which uses would prevent the other, he concluded that he had no statutory obligation to consider the public interest involved in the Pepco use. This, we submit, was a completely erroneous reading of the statute and one which, in effect, made nugatory the Congressional requirement that the Administrator assign the use of the airspace in order to achieve its most efficient utilization.

Actually, the statutory tests of "safety of aircraft" and "efficient utilization of . . . airspace" are not incompatible in this case, as the Administrator seems to think. The Administrator by his Determination outlawing Pepco's facilities (assuming, as we are solely for the purposes of argument, that to have been the effect of the Determination) certainly achieved the statutory end of insuring the safety of aircraft, but he failed wholly to consider or attempt to achieve the statutory purpose of efficient airspace utilization. If, on the other hand, the Administrator had received evidence, and made appropriate findings, with respect to such efficient utilization and had as a result determined that the competing aircraft operations should be outlawed, that would have achieved both of the statutory ends—aircraft safety would have been achieved by forbidding them to fly through the concerned airspace and efficient utilization would have been achieved by permitting Pepco to use its land, and the superjacent airspace, for its essential public service facilities.

If the issuing of a determination that a proposed Pepco transmission line tower will constitute a hazard to air navigation required nothing more than a finding of the physical fact that a 125 foot tall tower occupying airspace through which an airplane must fly will be a hazard to the flight of such airplane, there would be no need for the elaborate

investigatory and hearing procedures provided for in Part 626 of the Administrator's Regulations, nor would such determination necessarily operate "to insure . . . the efficient utilization of such airspace," although it would, of course, operate "to insure the safety of aircraft".

It is our position, as stated above, that the Administrator lacked statutory and constitutional authority to issue the Determination. If, however, it be held that the Administrator did have the necessary authority, then we submit that the Administrator erred in issuing the Determination by reason of the fact that he refused to receive evidence, and made no findings, as to which of the competing claims for the utilization of airspace represented the more "efficient utilization".

#### CONCLUSION

If the Determination is not intended to affect Pepco adversely, that should be made clear, either by revision of its language on remand or by judicial pronouncement, since it otherwise might, in the future, have such an adverse effect despite the lack of intent.

If, on the other hand, the Determination is intended to have an adverse effect on Pepco, then it should be set aside, and the proceedings leading to its issuance dismissed, as in excess of the Administrator's authority under the Act and the Constitution; or, if such authority be found to exist, it should be remanded to the Administrator for further proceedings to determine the efficient utilization of the concerned airspace in the light of the over-all public interest.

Respectfully submitted,

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June 17, 1963.

## **PETITIONER'S APPENDIX**

PETITIONER'S APPENDIX

TABLE OF CONTENTS

	Page
Federal Aviation Act of 1958 .....	P.A. 1
Notice of Proposed Rule Making as to Part 626 of Regulations .....	P.A. 17
Part 626 of Regulations .....	P.A. 20
Amendment to Part 626 of Regulation .....	P.A. 38
Further Amendments to Part 626 of Regulations ..	P.A. 39
Part 77 of Regulations (superseding Part 626 effective December 12, 1962) .....	P.A. 41
Senate Report No. 1811, July 9, 1958 .....	P.A. 43
House of Representatives Report No. 2360, August 2, 1958 .....	P.A. 59

P.A. 1

Public Law 85-726  
85th Congress, S. 3880

August 23, 1958

72 Stat. 731, 49 USC §§ 1301-1542

AN ACT

To continue the Civil Aeronautics Board as an agency of the United States, to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes.

• • • • •

TITLE I—GENERAL PROVISIONS

DEFINITIONS

SEC. 101. As used in this Act, unless the context otherwise requires—

(1) "Administrator" means the Administrator of the Federal Aviation Agency.

(2) "Aeronautics" means the science and art of flight.

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(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.†

(5) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

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† As amended by PL 87-197, § 3, Sept. 5, 1961, 75 Stat. 467.

P.A. 2

(9) "Airport" means a landing area used regularly by aircraft for receiving or discharging passengers or cargo.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

• • • • •

(13) "Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

(14) "Civil aircraft" means any aircraft other than a public aircraft.

(15) "Civil aircraft of the United States" means any aircraft registered as provided in this Act.

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(20) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof;

P.A. 3

or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

P.A. 4

(22) "Landing area" means any locality, either of land or water, including airports and intermediate landing fields, which is used, or intended to be used, for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo.

(23) "Mail" means United States mail and foreign-transit mail.

(24) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft.

(25) "Navigation of aircraft" or "navigate aircraft" includes the piloting of aircraft.

(26) "Operation of aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this Act.

(27) "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

\* \* \* \* \*

(29) "Possessions of the United States" means (a) the Canal Zone, but nothing herein shall impair or affect the jurisdiction which has heretofore been, or may hereafter be, granted to the President in respect of air navigation in the Canal Zone; and (b) all other possessions of the United States. Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this Act to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

P.A. 5

(30) "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.

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DECLARATION OF POLICY: THE ADMINISTRATOR

SEC. 103. In the exercise and performance of his powers and duties under this Act the Administrator shall consider the following, among other things, as being in the public interest:

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

(b) The promotion, encouragement, and development of civil aeronautics;

(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;

(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;

(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft.

PUBLIC RIGHT OF TRANSIT

SEC. 104. There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States.

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P.A. 6

TITLE III—ORGANIZATION OF AGENCY AND  
POWERS AND DUTIES OF ADMINISTRATOR

CREATION OF AGENCY

GENERAL

SEC. 301. (a) There is hereby established the Federal Aviation Agency, referred to in this Act as the "Agency". The Agency shall be headed by an Administrator who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall receive compensation at the rate of \$22,500 per annum. The Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Agency, and shall have authority and control over all personnel and activities thereof.  
\* \* \*

QUALIFICATIONS OF ADMINISTRATOR

(b) \* \* \* At the time of his nomination [the Administrator] shall be a civilian and shall have had experience in a field directly related to aviation. The Administrator shall have no pecuniary interest in or own any stock in or bonds of any aeronautical enterprise nor shall he engage in any other business, vocation, or employment.

\* \* \*

ORGANIZATION OF AGENCY

DEPUTY ADMINISTRATOR

SEC. 302. (a) There shall be a Deputy Administrator of the Agency who shall be appointed by the President by and with the advice and consent of the Senate. The Deputy Administrator \* \* \* shall perform such duties and exercise such powers as the Administrator shall prescribe. The Deputy Administrator shall act for, and exercise the powers of, the Administrator during his absence or disability.

P.A. 7

QUALIFICATIONS AND STATUS OF DEPUTY ADMINISTRATOR

(b) \* \* \* At the time of his nomination [the Deputy Administrator] shall have had experience in a field directly related to aviation. He shall have no pecuniary interest in nor own any stocks in or bonds of any aeronautical enterprise, nor shall be engaged in any other business, vocation, or employment. \* \* \*

\* \* \*

ADMINISTRATION OF THE AGENCY

AUTHORIZATION OF EXPENDITURES AND TRAVEL

SEC. 303. (a) The Administrator is empowered to make such expenditures at the seat of Government and elsewhere as may be necessary for the exercise and performance of the powers and duties vested in and imposed upon him by law, and as from time to time may be appropriated for by Congress, including expenditures for \* \* \* (5) membership in and cooperation with such organizations as are related to, or are part of, the civil aeronautics industry or the art of aeronautics \* \* \*; (7) making investigations and conducting studies in matters pertaining to aeronautics \* \* \*

\* \* \*

(c) The Administrator, on behalf of the United States, is authorized, where appropriate: \* \* \* (2) within the limits of available appropriations made by the Congress therefor, to acquire by purchase, condemnation, lease, or otherwise, real property or interests therein, including, in the case of air navigation facilities (including airports) owned by the United States and operated under the direction of the Administrator, easements through or other interests in airspace immediately adjacent thereto and needed in connection therewith \* \* \* Any such acquisition by condemnation may be made in accordance with the provisions of the Act of August 1, 1888 (40 U. S. C. 257; 25 Stat. 357), the Act of February 26, 1931 (40 U. S. C. 258a-258e; 46 Stat.

1421), or any other applicable Act: *Provided*, That in the case of condemnations of easements through or other interests in airspace, in fixing condemnation awards, consideration may be given to the reasonable probable future use of the underlying land.

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#### FOSTERING OF AIR COMMERCE

SEC. 305. The Administrator is empowered and directed to encourage and foster the development of civil aeronautics and air commerce in the United States and abroad.

#### NATIONAL DEFENSE AND CIVIL NEEDS

SEC. 306. In exercising the authority granted in, and discharging the duties imposed by, this Act, the Administrator shall give full consideration to the requirements of national defense, and of commercial and general aviation, and to the public right of freedom of transit through the navigable airspace.

#### AIRSPACE CONTROL AND FACILITIES

##### USE OF AIRSPACE

SEC. 307. (a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

##### AIR NAVIGATION FACILITIES

(b) The Administrator is authorized, within the limits of available appropriations made by the Congress, (1) to acquire, establish, and improve air-navigation facilities

## P.A. 9

wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the Government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic.

### AIR TRAFFIC RULES

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

### APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

(d) In the exercise of the rulemaking authority under subsections (a) and (c) of this section, the Administrator shall be subject to the provisions of the Administrative Procedure Act, notwithstanding any exception relating to military or naval functions in section 4 thereof.

### EXEMPTIONS

(e) The Administrator from time to time may grant exemptions from the requirements of any rule or regulation prescribed under this title if he finds that such action would be in the public interest.

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EXPENDITURE OF FEDERAL FUNDS FOR CERTAIN AIRPORTS, ETC.  
AIRPORTS FOR OTHER THAN MILITARY PURPOSES

SEC. 308. (a) No Federal funds, other than those expended under this Act, shall be expended, other than for military purposes (whether or not in cooperation with State or other local governmental agencies), for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area, or for the acquisition, establishment, construction, maintenance, or operation of air navigation facilities thereon, except upon written recommendation and certification by the Administrator that such landing area or facility is reasonably necessary for use in air commerce or in the interests of national defense. Any interested person may apply to the Administrator, under regulations prescribed by him, for such recommendation and certification with respect to any landing area or air navigation facility proposed to be established, constructed, altered, repaired, maintained, or operated by, or in the interests of, such person. There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.

LOCATION OF AIRPORTS, LANDING AREAS, AND MISSILE  
AND ROCKET SITES

(b) In order to assure conformity to plans and policies for allocations of airspace by the Administrator under section 307 of this Act, no military airport or landing area, or missile or rocket site shall be acquired, established, or constructed, or any runway layout substantially altered, unless reasonable prior notice thereof is given the Administrator so that he may advise \* \* \* as to the effects of such acquisition, establishment, construction, or alteration on the use of airspace by aircraft. \* \* \*

OTHER AIRPORTS

SEC. 309. In order to assure conformity to plans and policies for, and allocations of, airspace by the Adminis-

## P.A. 11

trator under section 307 of this Act, no airport or landing area not involving expenditure of Federal funds shall be established, or constructed, or any runway layout substantially altered unless reasonable prior notice thereof is given the Administrator, pursuant to regulations prescribed by him, so that he may advise as to the effects of such construction on the use of airspace by aircraft.

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### DEVELOPMENT PLANNING

#### GENERAL

SEC. 312. (a) The Administrator is directed to make long range plans for and formulate policy with respect to the orderly development and use of the navigable airspace, and the orderly development and location of landing areas, Federal airways, radar installations and all other aids and facilities for air navigation, as will best meet the needs of, and serve the interest of civil aeronautics and national defense, except for those needs of military agencies which are peculiar to air warfare and primarily of military concern.

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### OTHER POWERS AND DUTIES OF ADMINISTRATOR

#### GENERAL

SEC. 313. (a) The Administrator is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of this Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this Act.

#### PUBLICATIONS

(b) Except as may be otherwise provided in this Act, the Administrator shall make a report in writing on all pro-

ceedings and investigations under this Act in which formal hearings have been held, and shall state in such report his conclusions together with his decisions, order, or requirement in the premises. All such reports shall be entered of record and a copy thereof shall be furnished to all parties to the proceeding or investigation. The Administrator shall provide for the publication of such reports, and all other reports, orders, decisions, rules, and regulations issued by him under this Act in such form and manner as may be best adapted for public information and use. Publications purporting to be published by the Administrator shall be competent evidence of the orders, decisions, rules, regulations, and reports of the Administrator therein contained in all courts of the United States, and of the several States, Territories, and possessions thereof, and the District of Columbia, without further proof or authentication thereof.

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## TITLE IX—PENALTIES

### CIVIL PENALTIES

#### SAFETY AND POSTAL OFFENSES

SEC. 901. (a) (1) Any person who violates (A) any provision of title III, IV, V, VI, VII, or XII of this Act, or any rule, regulation, or order issued thereunder, \* \* \* shall be subject to a civil penalty of not to exceed \$1,000 for each such violation.† \* \* \*

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### CRIMINAL PENALTIES

#### GENERAL

SEC. 902. (a) Any person who knowingly and willfully violates any provision of this Act (except titles III, V, VI, VII, and XII), or any order, rule, or regulation issued by the Administrator \* \* \* under any such provision or any term, condition, or limitation of any certificate or permit

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† As amended by PL 87-528, § 12, July 10, 1962, 76 Stat. 149.

issued under title IV, for which no penalty is otherwise provided \* \* \* shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than \$500, and for any subsequent offense to a fine of not more than \$2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.†

## TITLE X—PROCEDURE

### CONDUCT OF PROCEEDINGS

SEC. 1001. The Board and the Administrator, subject to the provisions of this Act and the Administrative Procedure Act, may conduct their proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. \* \* \*

### ORDERS, NOTICES, AND SERVICE

#### EFFECTIVE DATE OF ORDERS; EMERGENCY ORDERS

SEC. 1005. (a) Except as otherwise provided in this Act, all orders, rules, and regulations of the Board or the Administrator shall take effect within such reasonable time as the Board or Administrator may prescribe, and shall continue in force until their further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: \* \* \*

#### COMPLIANCE WITH ORDER REQUIRED

(e) It shall be the duty of every person subject to this Act, and its agents and employees, to observe and comply with any order, rule, regulation, or certificate issued by the Administrator or the Board under this Act affecting such person so long as the same shall remain in effect.

† As amended by PL 87-528, § 13, July 10, 1962, 76 Stat. 150.

## P.A. 14

### FORM AND SERVICE OF ORDERS

(f) Every order of the Administrator or the Board shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

### JUDICIAL REVIEW OF ORDERS

#### ORDERS OF BOARD AND ADMINISTRATOR SUBJECT TO REVIEW

SEC. 1006. (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

#### VENUE

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

#### NOTICE TO BOARD OR ADMINISTRATOR; FILING OF TRANSCRIPT

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.†

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† As amended by PL 86-546, § 1, June 29, 1960, 74 Stat. 255.

## P.A. 15

### POWER OF COURT

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the \* \* \* Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.†

### FINDINGS OF FACT CONCLUSIVE

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

### CERTIFICATION OR CERTIORARI

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

### JUDICIAL ENFORCEMENT

#### JURISDICTION OF COURT

SEC. 1007. (a) If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Board or

† As amended by PL 87-225, § 2, Sept. 13, 1961, 75 Stat. 497.

Administrator, as the case may be, their duly authorized agents, or, in the case of a violation of section 401 (a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and requiring their obedience thereto.

#### APPLICATION FOR ENFORCEMENT

(b) Upon the request of the Board or Administrator, any district attorney of the United States to whom the Board or Administrator may apply is authorized to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this Act or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

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### TITLE XI—MISCELLANEOUS

#### HAZARDS TO AIR COMMERCE

SEC. 1101. The Administrator shall, by rules and regulations, or by order where necessary, require all persons to give adequate public notice, in the form and manner prescribed by the Administrator, of the construction or altera-

tion, or of the proposed construction or alteration, of any structure where notice will promote safety in air commerce.

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**Notice of Proposed Rule Making**  
(25 F. R. 8911)

Pursuant to the authority delegated to me by the Administrator \* \* \*, notice is hereby given that the Federal Aviation Agency has under consideration a proposal for the adoption of Part 626 of the regulations of the Administrator as hereinafter set forth.

Section 1101 of the Federal Aviation Act \* \* \* provides that the Administrator shall, by rules and regulations, or by order where necessary, require all persons to give adequate public notice, in the form and manner prescribed by the Administrator, of the construction or alteration of any structure where notice will promote safety in air commerce. Section 313(a) of the Federal Aviation Act \* \* \* empowers the Administrator to perform such acts, to conduct such investigations, to issue and amend such general or special rules, regulations, and procedures, pursuant to and consistent with the provisions of the Act, as he shall deem necessary to carry out the provisions of, and to exercise and perform his powers and duties under, the Act. Section 307(a) of the Federal Aviation Act \* \* \* authorizes and directs the Administrator to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. This section further provides that the Administrator may modify or revoke such assignment when required in the public interest.

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With the expansion of the aviation industry the problems presented by the construction or alteration of stru-

tures affecting safety in air commerce have become pressing and can no longer be satisfactorily resolved by presently established criteria and procedures. This is particularly true in view of the fact that the present procedures for the evaluation of proposed construction with regard to possible hazard to air commerce utilize various criteria developed at different times and for different purposes, some of which are regulatory in nature and others are of a policy nature. \* \* \* In addition, no Regulations of the Administrator presently exist establishing procedures for the consideration of the effects of structures upon safety in air commerce.

The only forum for considering this question with specific reference to broadcast structures, was established by Executive Order No. 9781, as amended, which created the Air Coordinating Committee. This Committee established rules of procedure whereby its Regional Subcommittees and Washington Airspace Panel conducted special aeronautical studies of the effect of proposed alteration or construction of broadcast structures and submitted their recommendations to the Federal Communications Commission in accordance with Part 17 of the Commission's rules. It is to be noted at this point that no other forum exists for the consideration of the effect of other tall structures upon safety in air commerce; and further that the Federal Communications Commission's consideration of antenna structures is in connection with the issuance of a construction permit or broadcast permit for broadcast purposes.

\* \* \* \* \*

In drafting the criteria contained in the proposed regulation, it was considered necessary to encompass the construction or alteration of any structure which would affect safety in air commerce to give meaning and effect to the requirement in section 1101 of the Act for notice as to such construction. Such portions of the presently existing criteria as could be adapted were carried forward in com-

bination with proposed changes and additions and incorporated into the text of this proposed regulation. In the development of the proposed criteria, the Agency has given consideration to the requirements for safety in air commerce and at the same time recognition to the requirements of the users of airspace for surface construction.

It is proposed herein to adopt a regulation which would establish when notice of construction must be given and the criteria for the determination of what proposed structures would constitute hazards to air commerce by reason of their location or height. Since such hazard criteria are universal in application, the regulation also provides procedures for giving individual consideration to a specific structure to permit the Agency to determine whether waiver of the criteria as applied to that structure would be consistent with safety of air commerce. These procedures will provide a forum and a means for the Agency to give full consideration to the public interest in safe air commerce and the interests of the construction sponsor.

The Agency contemplates that, in the application of this regulation and the aeronautical studies of specific proposals thereunder, consideration will be given to possible adjustments of aviation requirements to accommodate tall structures. This would include the raising of minimum flight levels and realigning routes, airways and other flight patterns. These studies would also provide for the consideration of possible adjustments to the location and height of proposed structures to eliminate or minimize non-conformance with the criteria.

In these criteria, specific recognition is given to the requirements of the broadcast industry through providing for the regulatory establishment of "antenna farm areas" of specific dimensions of area and height. Antenna proposals or other tall structures to be located within such areas and which would not exceed the established dimensions, are automatically excluded from the category of

aviation hazards. Although no specific antenna farm areas are proposed for establishment in this notice, a subsequent notice of proposed rule making will be issued by the Federal Aviation Agency within the near future wherein specific recognized farm areas now in existence will be proposed for establishment under this regulation.

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**Part 626—Notice of Construction or Alteration: Criteria, Procedures and Rules for Determination of the Effect of Proposed Structures Upon the Use of Navigable Airspace†**

[Preamble or Introductory Statement (26 FR 5287)]

On September 16, 1960, the Federal Aviation Agency published in the Federal Register (25 F.R. 8911) a proposed Part 626 of the Regulations of the Administrator which would establish requirements for notification of the contemplated construction or alteration of structures, criteria and procedures for the determination of the effect of such structures on air navigation, and the establishment of antenna farm areas.

The proposal evoked numerous comments from the aeronautical, television and broadcasting industries as well as railroads, power companies and other utilities, and related manufacturing industries. \* \* \* Due to the complexity of the subject matter of our proposal and its effect upon diverse non-aviation interests, a hearing was held on January 10 and 11, 1961. \* \* \*

A substantial number of comments were directed to the authority and jurisdiction of the Administrator to adopt a regulation on the subject of the heights of structures, particularly such structures as radio and television towers. A brief reference to our statutory authority should be sufficient here. The Federal Aviation Act continued the

† As effective from July 15, 1961 through December 11, 1962 (except that §§ 626.50 and 626.76(b) and (c) are as amended effective August 25, 1961).

recognition and declaration previously made in the Civil Aeronautics Act of the "public right of freedom of transit through the navigable airspace of the United States." In addition, the Act authorizes and directs the Administrator to regulate the use of the navigable airspace in order to insure aircraft safety and efficient utilization and to require notice of the proposed construction or alteration of any structure where such notice would promote air safety. These, and the other authorities referred to in the notice of proposed rule making, provide an ample basis for the regulatory action being taken here. This regulation not only constitutes a proper measure to carry out the purposes of the Act, but, under the circumstances, is required if we are to properly perform the responsibilities and duties entrusted to us by the Congress.

While substantial revision of the proposal was effected in the light of the comment received, Part 626 as adopted follows the general form of the proposal. Notification must be provided the Agency when the construction or alteration of a structure in excess of any of the specified heights is contemplated. Mathematical criteria are provided as guides for determining the effect proposed structures would have on air navigation. Procedures are provided for the conduct of informal airspace studies and hearings on whether specific construction proposals would constitute hazards to air navigation. Antenna farm areas will be established for the grouping of radio and television towers to decrease their use of the navigable airspace.

Several comments indicated a doubt as to the effect of the regulation on existing structures and on other Agency regulations relating to obstructions to air navigation. These points have been clarified by the addition of a section to emphasize that this regulation does not apply to structures in existence on its effective date and to clarify its effect on other Agency criteria.

Several parties suggested limitations on the requirement to notify the Agency of the proposed construction or alter-

ation of a structure. A provision has been incorporated in the regulation which will permit immediate action with minimum notice in any emergency involving essential public service, public health or safety. In a related notification area, the Agency found itself unable to comply with a request for relaxation of the requirement for additional notice at the time the new construction or alteration is erected to a height which would equal the original criteria. This notice is necessary to permit placing the new structure on charts used in air navigation. Such charting may not be accomplished on the basis of the initial notice since many proposed structures are never erected.

Many objections were voiced to the criteria which would determine hazards to air navigation and to the procedure by which these criteria would be applied. The regulation adopted does not brand immediately as hazards all proposed construction which would exceed the criteria but, rather, provides that the offending proposal would require only a preliminary determination of hazard, which preliminary determination would expire upon the initiation of an aeronautical study. Similarly, the objective of the study will be to determine whether the contemplated construction would, in fact, result in a hazard to air navigation. If the study discloses a hazard would not be created, the final determination will so state. Consequently, the provision for the granting of exemptions to the criteria has been eliminated.

The criteria established in the regulation are more lenient than those contained in the notice. \* \* \*

The procedures for the conduct of informal aeronautical studies are adopted substantially as proposed in the notice. These procedures are similar to those previously followed by the Air Coordinating Committee with the added feature that the construction sponsor is allowed to participate with all other interested persons in the discussion of the proposal and the material submitted in support of it and of

the aeronautical objections to it. Upon review of the comments in favor of a full transcript of these proceedings, it was determined that the benefits to be derived by the Agency would not be sufficient to justify the expense involved. The Agency does intend to take stenographic notes of these discussions and retain a summary of the studies based on these notes. Further, the procedures do not bar an interested party from providing his own means of recording the proceedings, or any portion of them, if he so desires.

The procedures proposed for the conduct of hearings on construction or alteration proposals contained many features designed to provide detailed protection of the rights of each participant. No person who commented endorsed these procedures and many attacked them as being unduly complicated. The Agency proposed these procedures with some reluctance, being aware that hearings conducted in accordance with them would consume substantial periods of time. In view of the public reaction, a simplified proceeding has been substituted by which these hearings may be expedited.

In the procedures governing both the informal aeronautical studies and the hearings, provision is made for the possible adjustment of (1) aviation requirements to accommodate the construction proposals and (2) the location and height of the proposed structures to eliminate or minimize their effects on air navigation. It is expected that a very large proportion of the conflicts between proposed structures and air navigation for the use of navigable airspace will be resolved in these informal studies and that a relatively small number will require a hearing.

Several comments were directed to the provision in the proposal for the establishment of antenna farm areas. We believe that proper fulfillment of our statutory responsibilities must include the promulgation of regulations which will lessen the detrimental effect of tall structures on the

use of the navigable airspace. The grouping of antenna structures is, obviously, such a measure. However, much of its beneficial effect could be lost if the farm areas established were not compatible with the over-all needs of the broadcast industry. Accordingly, this portion of our proposal has been revised to include an affirmative requirement that the views of the Federal Communications Commission will be requested before any antenna farm area is established and that such views will be given full consideration prior to any FAA action.

In consideration of the foregoing, Part 626 of the Regulations of the Administrator is adopted as follows:

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 AUTHORITY: §§ 626.1 to 626.1060 issued under secs. 104, 307, 313, 1001, and 1101, 72 Stat. 740, 749, 752, 788, and 797; 49 U.S.C. 1304, 1348, 1354, 1481, 1501.

#### SUBPART A—INTRODUCTION

##### § 626.1 Basis and purposes.

(a) The basis of this part is found in Titles I, III, X and XI of the Federal Aviation Act of 1958, as amended.

(b) The purposes of this part are as follows:

(1) To require all persons to give adequate public notice of the proposed construction or alteration of any structure where notice will promote safety in air commerce and to prescribe the form and manner of such notice.

(2) To establish criteria for the determination of whether proposed structures would be hazards to air navigation.

(3) To provide for the conduct of, and prescribe the procedures for, aeronautical studies of proposals for the erection of new or alteration of existing structures which would exceed the criteria herein; to determine the effects of such structures upon the safety of aircraft in flight and

the efficient utilization of airspace; and to prescribe the manner of issuance and publication of the determinations of such aeronautical studies.

(4) To provide for the initiation and conduct of public hearings for the purpose of making Final Determinations as to whether specific construction proposals would result in hazards to air navigation; to prescribe the rules and procedures for conducting such hearings; and to prescribe the manner of issuance and publication of the resulting orders.

(5) To establish antenna farm areas at prescribed geographical locations and with specified dimensions of area and height.

#### § 626.2 Definitions.

As used in this part, terms are defined as follows:

(a) "Administrator" means Administrator, Federal Aviation Agency.

(b) "Agency" means Federal Aviation Agency.

(d) "Airport" means a landing area used regularly by aircraft for receiving or discharging passengers or cargo.

(k) "Determination" means a decision issued by an Air Traffic Management Field Division or by the Obstruction Evaluation Branch as to the effect upon air navigation of a specific construction proposal, from an airspace utilization standpoint, which becomes a Final Determination if no appeal therefrom is granted.

(l) "Final determination" means a determination of the Agency from which no appeal is granted, or an order of the Administrator issued as a result of a public hearing with respect to a specific construction proposal.

(q) "Landing area" means any locality, either land or water, including airports and intermediate landing fields, which is used or intended to be used for the landing and take off of aircraft, whether or not facilities are provided for the shelter, servicing or repair of aircraft, or for receiving or discharging passengers or cargo.

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(u) "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic (including a federal, state or local Government agency); and includes any trustee, receiver, assignee, or other similar representative thereof.

(v) "Public notice" means notice to the Administrator as prescribed in § 626.9.

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(x) "Structure" means any form of construction or apparatus of a permanent or temporary character, including any implements or material used in the erection, alteration, or repair of such structure.

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### § 626.3 General.

(a) This part does not apply to structures in existence on its effective date, except with respect to any alteration to such structures after the effective date.

(b) The criteria in this part apply only in determining the effect construction proposals would have on air navigation from an airspace utilization standpoint, and do not supersede the criteria contained in Parts 609 or 610 of this chapter or in Technical Standard Order of the Administrator, TSO-N18, as to their intended uses.

**SUBPART B—REQUIREMENTS FOR NOTICE OF PROPOSED CONSTRUCTION OR ALTERATION; HAZARDS TO AIR NAVIGATION CRITERIA**

**§ 626.8 Scope and effect of subpart.**

(a) This subpart establishes the requirement for all persons to give adequate public notice of proposed construction or alteration of certain structures; specifies the location and dimensions of structures for which notice is required; prescribes the form and manner of such notices; and establishes criteria for the evaluation of the effect of such proposed construction or alteration on air navigation.

(b) The data received in such notices will provide information for charting and other notification to airmen of the new or altered structures. The criteria herein will be applied to establish which construction proposals requiring notice would result in hazard to air navigation unless, upon an aeronautical study under this part, a determination is made that such construction would not constitute a hazard.

**§ 626.9 Structures requiring notice.**

(a) Any person proposing to engage in the construction or alteration of any of the following shall give notice thereof to the Administrator in the form and manner prescribed in this subpart:

(1) Any structure which would be higher than one hundred and fifty feet above the construction site ground level, or above mean water level where the structure will be situated in or over water.

(2) Any structure within 15,000 feet of the boundary of any airport or other landing area, excluding heliports, which would extend above such airport or landing area elevation, or above the construction site ground level or mean water level where the structure will be situated in or over water, whichever is higher, more than one foot ver-

tically for each one hundred feet or fraction thereof of the horizontal distance from the structure to the airport or landing area boundary.

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(4) Any structure which would extend into an "airport or landing area approach plane".

(i) For purposes of this part an "airport or landing area approach plane" is defined as an imaginary surface extending from each end of any airport runway having a length of 2,000 feet,<sup>1</sup> or greater, longitudinally centered on the extended centerlines thereof, for a distance of 1,000 feet at the elevation of the approach end of the runway and thence sloping upward at a ratio of 1 to 60 but not to extend above the limits established in paragraph (2) of this subsection nor beyond 10,000 feet from the runway end.

• • • • •

(b) For non-instrument approach runways having a length of 2,000 up to but not including 5,000 feet, the width of the approach plane is 500 feet at the end adjacent to the runway and expands uniformly at a ratio which would reach a width of 3,000 feet at a distance of 10,000 feet from the end of the runway.

(5) Any structure within 500 feet of the centerline of any runway.

(6) Any structure more than 500 feet from runway centerline which would project above an inclined plane extending upward from the ground from a base line 500 feet either side of and parallel with each runway centerline, sloping upward and away from the runway at a ratio of 1 to 7 to a height of 150 feet above airport elevation.

(7) Any structure which would project above an inclined plane which extends upward and away from the

<sup>1</sup> Runway lengths referred to in this part are measured runway lengths corrected as prescribed in Technical Standard Order of the Administrator, TSO-N6B (§ 551.6 of this title).

outer edge of an "airport or landing area approach plane" at a ratio of 1 to 7 until it intersects the limits described in subsection (2) of this section, but not to exceed a height of 150 feet above airport elevation.

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 § 626.10 Form and time of notice.

(a) Notices required under § 626.9 shall be submitted to the agency in triplicate on Form FAA-117, "Notice of Proposed Construction or Alteration," not less than 30 days prior to the date, (1) the construction or alteration is proposed to begin, or (2) an application for a construction permit is to be filed, whichever is earlier: *Provided*, that notices relating to proposed construction subject to the licensing requirements of the Federal Communications Act may be submitted to the Agency at the time the application for construction permit is filed with the Federal Communications Commission.†

(b) In case of an emergency involving essential public service, public health or safety, which would require immediate construction or alteration, the 30 day requirement in subsection (a) of this section will not apply and such notice may be communicated by telephone, telegraph or other expeditious means. The executed Form FAA-117 shall be submitted within 5 days thereafter.

(c) All "Notices of Proposed Construction or Alteration," shall be submitted to the Chief, Air Traffic Management Field Division of the nearest Regional Office of the Federal Aviation Agency, or to the Chief, Airspace Utilization Division, Federal Aviation Agency, Washington 25, D.C.

§ 626.11 Acknowledgment of notice.

(a) The Agency will acknowledge receipt of notices submitted under § 626.9.

† As amended by "Form and Time of Notice" amendment issued on July 15, 1961 (see below).

(b) If a proposed structure would not exceed the criteria of hazards to air navigation set forth in § 626.12, the acknowledgment will contain a statement to this effect and a request that the acknowledging office be notified when the structure, during construction, reaches the minimum height requiring notice under § 626.9.

(c) If a proposed structure would exceed any of the criteria of hazards to air navigation set forth in § 626.12, the acknowledgment of notice will include:

(1) A statement advising the construction sponsor that a structure erected at the location and to the height described in the notice would violate specified criteria and that, consequently, a preliminary determination had been made that such structure would be a hazard to air navigation.

(2) Where appropriate, a statement of possible modification of the construction proposal which would eliminate violation of the criteria.

(3) A statement that the construction sponsor may request the Agency, within thirty (30) days of the date of the acknowledgment, to conduct an aeronautical study of the noticed construction proposal or an amended proposal and that the preliminary determination of hazard would expire upon initiation of an aeronautical study.

(4) A notification that the preliminary determination of hazard would become final unless a request for an aeronautical study was received within thirty (30) days of the date of the acknowledgment or an aeronautical study was initiated within sixty (60) days of such date.

§ 626.12 Hazards to air navigation—criteria.

(a) With the exception of any structure to be erected entirely within the confines of an antenna farm area established in Subpart E of this part, any proposed structure which is the subject of a notice submitted under § 626.10

and which would extend above any of the following criteria would ultimately be determined to be a hazard to air navigation unless, upon an aeronautical study of the structure under this part, the Agency finds that notwithstanding violation of criteria, such construction would not constitute a hazard.

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(6) Any airport imaginary surface as defined in § 626.13.

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§ 626.13 Airport imaginary surfaces—definitions.

(a) The following airport imaginary surfaces are established for airports and other landing areas based upon the length of the longest runway:

(1) *Inner horizontal surface.* The inner horizontal surface is a circular plane, 150 feet above the established elevation of the landing area having a radius from the airport reference point as follows:

(i)  $2\frac{1}{2}$  miles (13,200 feet)—runways 5,000 feet or greater in length.

(ii)  $1\frac{1}{2}$  miles (7,920 feet)—runways 2,000 feet up to but not including 5,000 feet in length.

(iii) 1 mile (5,280 feet)—runways less than 2,000 feet in length.

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(b) The following airport imaginary surfaces are established for runways as follows:

• • • • •  
(2) *Non-instrument approach area surface.* A non-instrument approach area surface is a plane longitudinally centered on the extended runway centerline. All runways for which no instrument approach with "straight-in" landing minimums is prescribed will have non-instrument ap-

proach area surfaces at each end with the following dimensions:

(i) For runways 5,000 feet or greater in length—beginning at the end of the runway and extending 500 feet outward at the elevation of the approach end of the runway and then sloping upward at a ratio of 1 to 50, having a width of 1,000 feet at the beginning and expanding uniformly to a width of 4,000 feet at the outer extremity, 10,000 feet from the end of the runway.

(ii) For runways 2,000 feet up to but not including 5,000 feet in length—beginning at the end of the runway and extending 500 feet outward at the elevation of the approach end of the runway and then sloping upward at a ratio of 1 to 40, having a width of 500 feet at the beginning and expanding uniformly to a width of 3,000 feet at the outer extremity, 10,000 feet from the end of the runway.

(iii) For runways less than 2,000 feet in length—beginning at the end of the runway, at the elevation of the approach end of the runway and sloping upward at a ratio of 1 to 20, having a width of 250 feet at the beginning and expanding uniformly to a width of 2,000 feet at the outer extremity, 10,000 feet from the end of the runway.

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#### SUBPART C—PROCEDURES FOR AERONAUTICAL STUDIES OF THE EFFECT OF PROPOSED CONSTRUCTION ON THE USE OF THE NAVIGABLE AIRSPACE

§ 626.30 Scope and effect of subpart.

(a) This subpart establishes the procedures to be applied in the initiation and administrative processing of informal aeronautical studies of the effect of proposed structures on the use of the navigable airspace by aircraft. Whenever such a study is undertaken, its conclusion will normally be a Determination as to whether the specific construction proposal under consideration would be a hazard to air navigation.

§ 626.31 Initiation of aeronautical studies.

(a) Aeronautical studies of the effects upon the use of the navigable airspace which would result from the construction or alteration of structures to heights exceeding the hazards to air navigation criteria in § 626.12, will be initiated by the Agency when:

(1) The sponsor of such proposed construction or alteration, noticed in compliance with § 626.9, requests it, or

(2) The Agency determines it appropriate.

§ 626.32 Agency Regional Office procedures for aeronautical studies.

(a) When an aeronautical study is initiated, the Air Traffic Management Field Division of the Region within which the construction is proposed will notify all known interested persons, including the construction sponsor, by informal circularization, that the proposed construction is the subject of an informal aeronautical study. The notification circular will include sufficient details of the proposed structure to provide the basis for the study, such as location by geographical coordinates, height above ground, and height above mean sea level, and will solicit aeronautical comment on the proposal.

(b) Should the ATM Field Division find no substantial aeronautical objection to the construction proposal in comments responding to the circular or from its own analysis, that Division will then notify the construction sponsor by letter of its determination that the proposed construction would not result in a hazard to air navigation. Copies of this letter will be distributed to all known interested persons. In the event that the proposed structure is to be used for or in connection with communications, copies of this letter will also be transmitted to the Secretary, Federal Communications Commission.

(c) Should the ATM Field Division find substantial aeronautical objection to the proposed construction in the com-

P.A. 34

ments filed by any person in response to the circular or as a result of its own analysis of the proposal, the following procedures will apply:

(1) The ATM Field Division will furnish all interested persons, including the construction sponsor, written notification of an informal meeting to be held at the FAA Regional Office at which the aeronautical study of the proposed construction would be an agenda item. A designated Agency representative will preside at such meetings. Any interested person may attend in person or be represented by attorney or other authorized representative, and may introduce at the meeting such material, oral presentation or written statements as may be pertinent to the aeronautical study of the proposed structure. In addition to the evaluation of the effect of the proposed construction on air navigation, the purposes of such a meeting are to explore aeronautical objections to the proposal, to attempt to develop recommendations for adjustments in aviation requirements which would accommodate the proposed construction, and to examine possible modification of the proposed construction, including revisions of the proposal which would eliminate the violation of criteria.

(2) A summary report of this informal consideration of the proposed structure and recommended conclusions regarding the effect of the proposed structure upon the use of the navigable airspace will be prepared by the ATM Field Division and forwarded, together with copies of all pertinent written material and statements received in response to the circular and in the informal meeting, for review by the Obstruction Evaluation Branch of the Airspace Utilization Division.

§ 626.33 Agency Washington Office review and issuance of determinations.

(a) Based upon its review and analysis of each report of informal aeronautical study received from the ATM Field Division, the Obstruction Evaluation Branch will

evaluate each such construction proposal as to its effect upon the safe and efficient utilization of airspace by aircraft, and issue a determination as to whether the proposed construction would be a hazard to air navigation. Such determination shall include appropriate findings and copies will be distributed to the construction sponsor and other interested persons, including the Secretary of the Federal Communications Commission, if appropriate. The determination will be published in the **FEDERAL REGISTER**. Each determination becomes a final determination unless an appeal therefrom under § 626.34 is granted.

§ 626.34 Petitions for public hearing.

(a) The sponsor of a proposed construction project or any person who stated substantial aeronautical objection to the proposed construction in the informal aeronautical study may file a petition with the Administrator within 30 days of the date of issuance of the determination, for a public hearing for the purpose of obtaining a formal decision of the Administrator on the matter.

(b) Petitions under this section must be filed in triplicate and shall contain a full statement of the basis for the petition.

(c) Such petition will be ruled upon by the Administrator as to whether the substance of the petition has adequate foundation, and a hearing will be granted or denied on the basis of the Administrator's ruling.

§ 626.35 Effective period of Agency final determinations of no hazard.

(a) Unless otherwise revised or terminated, each final determination that proposed construction would not be a hazard to air navigation under this subpart or Subpart D of this part will expire eighteen (18) months after its effective date or upon abandonment of the proposed construction, whichever may occur sooner. Where construction has not been commenced during the 18-month period any in-

interested person may petition the Administrator for (1) a revision of such final determination upon the development of new facts which alter the basis upon which the determination was made, or (2) an extension of the effective period of the determination. The Administrator will provide an appropriate review of the petition and the facts upon which it is based and will revise, extend or reaffirm the determination as indicated by his findings.

#### SUBPART D—RULES OF PRACTICE IN HEARINGS ON PROPOSED CONSTRUCTION OR ALTERATION OF STRUCTURES

##### § 626.50 Applicability of subpart.

The provisions of this subpart shall govern all hearings conducted by the Federal Aviation Agency under authority of Titles III and X of the Federal Aviation Act of 1958 on the proposed construction or alteration of structures which affect the use of the navigable airspace.

NOTE: Any findings entered hereunder are without prejudice to the jurisdiction of the Federal Communications Commission to grant or deny applications for construction permits under the Communications Act of 1934, as amended.†

##### § 626.51 Nature of hearing.

Hearings conducted on the proposed construction or alteration of structures in order to determine the effect of such construction or alteration upon the safety of aircraft and the efficient utilization of the navigable airspace are purely fact-finding in nature and, therefore, are not subject to the provisions of sections 4, 5, 7 and 8 of the Administrative Procedure Act. As a fact-finding procedure, the hearing is non-adversary and there are no formal pleadings or issues and no adverse parties.

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† "Note" added by "Miscellaneous Amendments" effective August 25, 1961 (see below).

SUBPART E—ESTABLISHMENT OF ANTENNA FARM AREAS

§ 626.75 Scope and effect of subpart.

(a) This subpart establishes antenna farm areas in which antenna structures may be sited for the purpose of grouping such structures to localize their effect upon the use of the navigable airspace. The hazard criteria of § 626.12 will not apply to structures which will be located entirely within the confines of an established antenna farm area.

(b) It is the policy of the Agency to encourage the use of the antenna farm and the single structure multiple antenna concept for radio and television towers wherever possible. In studying proposals for the establishment of antenna farm areas, the Agency will give every consideration possible to the revision of aeronautical procedures and operations to accommodate antenna structures which would fulfill the broadcaster's requirements.

§ 626.76 General.

(a) An antenna farm area is an area at a specified geographical location with established dimensions of area and height where antenna towers having a common impact on aviation may be grouped.

(b) Each proposal for an antenna farm area will be evaluated on the basis of its effect on the use of the navigable airspace. The views of the Federal Communications Commission with respect to the effect of the establishment of each proposed antenna farm area on the statutory responsibilities of the Commission will be requested, and any views submitted will be granted full consideration, prior to the establishment of any such area. If the Commission advises that establishment of the proposed antenna farm area would interfere with its statutory responsibilities, the proposed area will not be established.†

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† Last sentence added by "Miscellaneous Amendments" effective August 25, 1961 (see below).

(c) An antenna farm area will be considered for establishment when proposed by the Agency, the Federal Communications Commission, the sponsor of a proposed antenna tower, or any person having a substantial interest in any such proposed tower.†

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# **Amendment to Part 626**

FORM AND TIME OF NOTICE (amendment effective  
July 15, 1961)

[Preamble or Introductory Statement (26 FR 6544)]

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“In implementation of the authority granted the Administrator by section 1101 of the Federal Aviation Act to require notice of the proposed construction or alteration of any structure where notice would promote safety in air commerce, Part 626 requires in § 626.10 that notice of these construction proposals must be submitted to the Agency not less than 30 days prior to the date the construction is to begin or an application for a construction or broadcast permit is to be filed, whichever is earlier. The provision for 30 days advance notice was included so that the FAA processing of the construction proposals might be initiated and, in some cases completed, prior to the filing for other permits which the applicant might later determine should be revised in the light of the FAA determination.

Several segments of the broadcast industry objected to this provision on the ground that the requirement for notice 30 days prior to the filing of an application for a construction permit with the Federal Communications Commission would cause them substantial hardship. The Agency review of the comments submitted on this point did not reveal a justifiable basis for the deletion of the requirement. However, since the adoption of the rule, additional comment has been received from industry and support of these comments has been advanced informally by the FCC.

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† As amended by “Miscellaneous Amendments” effective August 25, 1961 (see below).

The Commission has indicated that deletion of the advance notice provision should not operate to the detriment of either the Agency or the Commission. From the FCC representations, it appears that applications for construction permits filed with the Commission and Notices of construction proposal filed with the Agency may be processed concurrently without adversely affecting the proper discharge of the statutory responsibilities of the two federal agencies.

The considerations applicable to our conclusion regarding FCC applications do not exist with respect to applications for other types of permits with other government bodies. The possible difficulties in effecting necessary coordination with the many political subdivisions below the federal level requires that we retain the provision for advance notice in all other cases. Accordingly, this revision is limited to notices for structures requiring FCC approval."

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#### Further Amendments to Part 626

MISCELLANEOUS AMENDMENTS (effective August 25, 1961)

[Preamble or Introductory Statement (26 FR 8171)]

Part 626 was adopted on June 12, 1961 (26 F.R. 5287), to establish requirements for notification to the Federal Aviation Agency of proposed structures which would project into the navigable airspace, provide criteria and procedures for determining the effect of such structures on air navigation, and provide for the establishment of antenna farm areas where tall towers could be grouped to lessen their impact on the use by aircraft of the navigable airspace.

The adoption of Part 626 was accompanied and followed by discussions with the Federal Communications Commission to coordinate FAA operations under the new regulations with the activities of the Commission in the issuance of construction permits for antenna towers under the Com-

munications Act of 1934. The amendments which follow implement the conclusions reached in those discussions.

For a number of years the FCC Rules have exempted from their requirements for special aeronautical study all antenna structures of 20 feet or less in height. The Commission advises that operations under this exemption have been advantageous to both Government and industry. An Agency review has disclosed that exclusion of this type of structure from the application of Part 626 should not derogate the performance of the Agency functions under the Federal Aviation Act. Accordingly, Part 626 is amended herein to except antennas not exceeding 20 feet in height. A minor amendment is also being adopted at this time to except certain air navigation aids and related devices.

The FAA-FCC discussions underscored the existence of uncertainty in the broadcast industry with respect to the effect on FCC jurisdiction of the Agency findings made subsequent to the hearings held under Subpart D. These hearings are conducted to determine the effect of proposed structures upon the safety of aircraft and the efficient utilization of the navigable airspace. The findings made form the basis for a determination as to whether a proposed structure would, in fact, result in a hazard to air navigation. While we regard this determination as a final one on the question of air hazard, our findings should not be construed to prejudice the exercise by the Commission of its statutory jurisdiction, particularly its authority to determine whether a construction permit for such a structure should be issued. Accordingly, we are promulgating an expression of our opinion on this point. This conclusion should not be interpreted as an attempt to settle any justiciable rights which may be the subject of later controversy. Any individual who believes an FAA or FCC action has deprived him of one or more rights may apply, of course, to the appropriate court for a review and decision on the matter.

In the adoption of the regulations providing for the establishment of antenna farm areas, a provision was included under which the views of the Federal Communications Commission would be considered prior to establishment of a particular farm area. In order to remove any doubt regarding the weight which this Agency would give those views, an amendment is made here to state specifically that a proposed antenna farm area will not be established if the FCC advises that the establishment would interfere with its statutory responsibilities. Similarly, while the FAA would consider the establishment of any farm area when proposed by the FCC, Part 626 did not expressly reveal this in its original form. Consequently, it is now being revised to include the Federal Communications Commission in the list of those agencies which may propose the establishment of an antenna farm area.

Since these amendments either reduce a burden on the public or are editorial in nature, notice and public procedure hereon are unnecessary and they may be made effective immediately.

In consideration of the foregoing, Part 626 of the regulations of the Administrator is hereby amended as follows:

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**Part 77—Notice of Construction or Alteration Affecting Navigable Airspace [New]†**

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**§ 77.37 Headquarters review and issue of determination.**

(a) Based on its review and analysis of the report made under § 77.35, the Obstruction Evaluation Branch evaluates each construction or alteration proposal as to its effect on the safe and efficient use of airspace by aircraft. The Chief of that Branch issues a determination as to whether it would be a hazard to air navigation, including appropri-

† Part 77 became effective on December 12, 1962 as part of Subchapter E [New] of Chapter I of Title 14 of the Code of Federal Regulations. It superseded Part 626.

ate findings. He sends copies of the determination to the sponsor of the construction or alteration and each other interested person (including the Secretary of the Federal Communications Commission, if appropriate), and publishes it in the Federal Register.

(b) A determination made under this section is final unless an appeal from it is granted under § 77.39 [sic].

§ 77.39 Petitions for public hearing.

(a) The sponsor of any proposed construction or alteration, or any person who stated a substantial aeronautical objection to it in the study made under § 77.35 may petition the Administrator, within 30 days after the date the determination is issued under § 77.39, for a public hearing to obtain a formal decision of the Administrator on the matter.

(b) The petition must be in triplicate and must contain a full statement of the basis for it.

(c) The Administrator determines whether there is adequate grounds for the substance of the petition and grants or denies a hearing on that basis.

§ 77.41 Effective period of determination of no hazard.

(a) Unless it is otherwise revised or terminated, each final determination, made under this subpart or Subpart E of this Part, that proposed construction or alteration would not be a hazard to air navigation, expires 18 months after its effective date or upon the date the proposed construction or alteration is abandoned, whichever is earlier.

(b) In any case where the proposed construction or alteration has not been started during the 18-month period any interested person may petition the Administrator to—

(1) Revise the final determination based on new facts that alter the basis upon which the determination was made; or

(2) Extend the effective period of the determination.

(c) The Administrator provides an appropriate review for each petition and the facts upon which it is based, and revises, extends, or reaffirms the determination as indicated by his findings.

**SUBPART E—RULES OF PRACTICE FOR HEARINGS UNDER  
SUBPART D**

**§ 77.51 Scope.**

This subpart applies to hearings held by the FAA under Titles III and X of the Federal Aviation Act of 1958 (49 U.S.C. Subchapters III and X), on proposed construction or alteration that affects the use of navigable airspace.

**§ 77.53 Nature of hearing.**

Sections 4, 5, 7, and 8 of the Administrative Procedure Act (5 U.S.C. 1003, 1004, 1006, and 1007) do not apply to hearings held on proposed construction or alteration to determine its effect on the safety of aircraft and the efficient use of navigable airspace because those hearings are fact-finding in nature. As a fact-finding procedure, each hearing is nonadversary and there are no formal pleadings or issues and no adverse parties.

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**Senate Report No. 1811, July 9, 1958**

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The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 3880) to create an independent Federal Aviation Agency, to provide for the safe and efficient use of the airspace by both civil and military operations, and to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, having considered the same, report favorably thereon with amendments and recommended that the bill as amended do pass.

## I. SUMMARY OF THE BILL

The present measure, to be cited as the Federal Aviation Act of 1958, reenacts the Civil Aeronautics Act of 1938 substantially changed to create a separate Federal Aviation Agency. The Administrator of the new Agency (1) would be given full responsibility and authority for the advancement and promotion of civil aeronautics generally, including the promulgation and enforcement of safety regulations, and (2) would be charged with the management of the national airspace, including responsibility for prescribing air traffic rules and for the development and operation of air navigation facilities. Appropriate military participation in the latter function is also provided for.

In addition, the bill makes technical and perfecting amendments in existing aviation law, to conform to the new organization.

## II. TITLE-BY-TITLE SUMMARY

*Title I. General provisions:* Contains no important changes in existing law. The list of definitions has been amended in several respects to accommodate substantive changes made by the proposed act, to reflect current judicial interpretations, or to delete obsolete material.

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*Title III. Organization of Agency and powers and duties of Administrator:* Is almost entirely new. It establishes a new Federal Aviation Agency under the direction of a civilian Administrator and a Deputy Administrator who may be a member of the Armed Forces. Both shall be appointed by the President, by and with the advice and consent of the Senate.

The Administrator is empowered to regulate the use of the navigable airspace; to acquire, establish, operate, and improve air navigation facilities; to prescribe air traffic rules for all aircraft; and to conduct related research and

development activities. In addition, his approval would be required for the location or substantial alteration of any military or civilian airport, or rocket or missile site, involving the expenditure of Federal funds. Prior notice to him would also be required for the construction of any other landing area. Provision is made for exceptions and for a general exemption from the Administrator's air traffic control powers in case of a military emergency.

In the exercise of these functions the Administrator is to be assisted by a staff of military personnel. The President may also transfer military air traffic control functions and personnel to the Agency. Provision is made for future reports to Congress on the effective employment of military staff personnel as well as with regard to special problems involving the status of operational personnel. A special study on legislation for wartime operations is also called for .

Title III also extends appropriate administrative powers and duties to the Administrator including provisions for the employment, training, and transfer of personnel; for delegation of functions; acquisition and transfer of property and appropriations; collection of information; conduct of hearings and investigations; and publication of required reports.

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*Title XII. Miscellaneous:* Contains no substantial revision of sections dealing with hazards to air commerce, the applicability of international agreements, and use of documents filed.

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### III. THE NEED FOR NEW AVIATION LEGISLATION

#### A. THE NEW FRONTIER

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Twenty years ago the airplane still played an essentially supplementary, or exceptional, role in our economy. Today, aviation is "big business" with our Nation's airways

serving as principal arties of commerce and recreation. With the imminent advent of civil jet operations we will take another giant step in the ever-greater exploitation of this buoyant resource aloft. The steady advance of the American frontier has never halted; it is now merely proceeding in a new direction. And, unfortunately, the frontier still appears to be as much in need of law and order as ever.

#### B. DIFFUSION OF FEDERAL REGULATION

As pointed out by Stuart Tipton, president of the Air Transport Association, aviation is unique among transportation industries in its relation to the Federal Government—it is the only one whose operations are conducted almost wholly within the Federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest. How well has this responsibility been discharged?

Your committee would not answer this question favorably in view of the following paradoxical development:

While the problems and stresses inevitably brought about by the rapid growth of civil aviation and increased airways utilization have become ever more concentrated and acute, the authority to deal with them has become correspondingly more scattered and diffused.

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#### *Subordination and coordination*

The Civil Aeronautics Administration retained the responsibility for day-to-day management of the skyways, and thus was the one agency whose voice was most to be heeded in planning the expansion and modernization of aviation facilities. However, buried deep in the Department of Commerce, a conscientious Administrator's pleas

for even a minimum of urgently required improvements were too often ignored or overruled by disinterested or preoccupied departmental superiors or by economy-minded budget officials.

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As a result of these developments, it is fair to say that during the critical postwar period proper development planning for civil aeronautics was often stifled by subordination to other interests or neutralized in the process of coordination.

#### C. THE AIR TRAFFIC CONTROL CRISIS

Nowhere did the twin evils of subordination and coordination produce more unfortunate results than in the highly critical field of air-traffic control and air-navigation-facilities planning. With an increasing number of faster planes crowding our airways each year, making general reliance on the old flight rule of "see and be seen" ever more hazardous, the need to revamp completely our outmoded traffic-control system became acute. Yet, year after year, CAA's requests for funds to buy long-range radar and other equipment necessary to permit a higher degree of positive traffic control were denied by the Department of Commerce or the Bureau of the Budget.

At the same time, it became obvious that a modern electronic system of control would require joint civil-military planning. Coordination in this area—the development of a so-called "common system"—was largely the responsibility of an Air Navigation Development Board composed of representatives from the Departments of Commerce and Defense, each department exercising a veto. One of chief results of this type of "coordination" was the now famous TACAN-VOR/DME fiasco which involved the expenditure of millions of dollars for the planning and development of a military air-navigation system that was essentially in-

compatible with the system being developed by civil authorities.

As a direct result of these circumstances, the bleak fact is that our airways-control system is largely inadequate for present civil and military needs. This is the price we are now paying for years of diffusion, confusion, and a bargain-basement approach to the problems of aeronautical development.

#### IV. BACKGROUND OF THE PRESENT MEASURE

##### A. RECENT STUDIES

Fortunately, in the past 2 or 3 years, there has come about a wide-spread recognition of the inadequacy of aviation planning. • • •

In the executive branch a review of aviation-facilities problems was undertaken in 1955 by William B. Harding for the Bureau of the Budget. As a result of his recommendations the President appointed Gen. Edward C. Curtis to undertake a comprehensive study of how to bring about unified facilities planning. • • •

The most significant part of the Curtis report, however, was its recognition of broader organizational deficiencies and its confirmation of the need—a need which was previously recognized in the Congress—for establishment of an independent Federal Aviation Agency with plenary authority over the Nation's airspace into which would be consolidated all essential aeronautical management functions. This proposal thus finally came to grips with the obvious fact that proper long-term solutions to the technical problems of aviation development can be achieved only within the framework of a new, adequately empowered governmental organization.

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B. LEGISLATION NEEDED NOW

It is unfortunate that positive action for creating a central aviation authority is only now being undertaken. The period of grace, the time for relaxed planning and reorganization, has long since run out. In June of 1956, with the collision of two heavily laden airliners over the Grand Canyon, followed more recently by midair collisions involving military jets and civilian aircraft over Las Vegas, Nev., and Brunswick, Md., we began to reap the dire fruits of delay in providing the essentials of proper airways management. And to judge from a late bulletin from the Civil Aeronautics Board, indicating that there were a total of 971 reported near misses aloft during 1957, we should be thankful indeed that the harvest has not been greater.

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It was for this reason that your committee, in recommending the airways-modernization bill of last year, inserted a provision calling for the submission by January of 1959 of draft legislation to implement the Curtis proposal for a Federal aviation agency instead of deferring action for an additional 2 years as originally provided in the draft of that bill submitted by the administration. Now, however, all are convinced that the need for action is too urgent to admit of any further delay. This opinion was emphatically echoed by all who testified at the hearings on the present measure.

C. COMMITTEE ACTION ON S. 3880

The present legislation was introduced on May 21 by Senator Monroney, chairman of the Aviation Subcommittee, and has bipartisan cosponsorship by 33 other Members of the Senate. A companion measure has also been introduced in the House of Representatives by Congressman Oren Harris, chairman of the Committee on Interstate and Foreign Commerce.

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A discussion of the more significant executive recommendations adopted in the committee amendment being reported is given below. Also included as an appendix to this report is the text of the President's message of June 13.

• • • • •  
V. DISCUSSION OF PRINCIPAL PROVISIONS

The present legislation attempts to correct two fundamental deficiencies which now exist in the exercise of our Federal Government's responsibility for aviation matters. Discussed in a previous section, these two shortcomings may be stated as follows:

(1) Diffusion of authority for the general regulation of civil aeronautics together with a subordination of aviation interests within the Government; and

(2) Lack of clear statutory authority for centralized airspace management and essentially related activities.

The way in which S. 3380 meets each of these problems will be discussed in turn, followed by a review of the bill's provision for military participation.

• • • • •  
B. CENTRALIZED AIRSPACE MANAGEMENT

As indicated in a preceding section of this report, the most urgent need in aviation today is for the prompt development and institution of a system of air-traffic control which will insure the utmost degree of safety for all airspace users, civil and military alike. Your committee has suggested that part of the reason why such a system is not yet operating is because responsibility for its planning has until quite recently been scattered among a plethora of interagency committees and boards instead of being concentrated in one overall authority. But it should also be stated that this situation has been made almost inevitable

by the lack of any clear provision in present law for unified control of our national airspace.

*A diminishing resource*

The question of airspace management, which includes within it the twin problems of air-traffic control and air-navigation-facilities development, was hardly conceived at the time our present basic aviation statutes, the Civil Aeronautics Act of 1938 and the Air Commerce Act of 1926, were enacted.

\* \* \* \* \*

The problem presented by this recent overcrowding of the airspace is difficult if not impossible of adequate solution within the framework of present aviation statutes. The principal statutory grant of authority for airspace assignment is contained in section 4 of the Air Commerce Act of 1926 which gives the President power to establish airspace reservations within which flight may be prohibited or restricted. No comparable grant has ever been made to the Civil Aeronautics Board, although section 601 (a) (7) of the Civil Aeronautics Act does permit that body to issue air traffic rules. However, even in this respect the Supreme Court, in *United States v. Causby* (328 U.S. 256, 258), interpreting *Cameron v. Civil Aeronautics Board* (140 F. 2d 482), raised the question whether such rules are binding upon military aircraft in all cases. Furthermore, until the passage last year of the Airways Modernization Act the law was completely silent on the question of unified development of air navigation facilities.

Until quite recently, all matters involving the use of airspace were referred to the Airspace Panel of the inter-agency Air Coordinating Committee, a group first set up by Executive order in 1946, with representatives of the Army, Navy, Air Force, Post Office, Treasury, and Commerce Departments, as well as from the Civil Aeronautics Board and the Federal Communications Commission—all

agencies with any interest whatever in airspace utilization. It should be unnecessary to note that all the evils inherent in a system of interagency coordination mentioned in section II of this report were present in full force in the Air Coordinating Committee. Perhaps the best comment on the deficiencies of airspace management by this group was contained in a draft release issued by the Civil Aeronautics Board in July of 1957 proposing the establishment of new airspace allocation procedures:

Growing conflicts between the establishment of airways and actual or contemplated military training and practice areas have made designation of airspace time-consuming and contentious \* \* \* it is now apparent that it (the ACC) cannot cope with the complex problem of diminishing airspace on the one hand and increased need for airspace on the other. Compromises resulting from the need to obtain unanimous agreement have not always been in the public interest.

Now, after long and arduous negotiation with military authorities, the Civil Aeronautics Board has recently issued a rule delegating to the Civil Aeronautics Administrator control over airspace allocation, and tightening up the military exception clause in the air traffic rules. The Board is to be complimented for its apparent success in asserting something like unified control in these matters. However, it must be recognized that this action rests for the most part upon the shifting sands of legal ambiguity.

#### *Plenary airspace control*

The present legislation proposes to clear away this ambiguity once and for all by vesting unquestionable authority for all aspects of airspace management in the Administrator of the new Agency. The "heart" of the proposed Federal Aviation Act is contained in section 307 (a)

\* \* \* \* \*

The Administrator is also given plenary authority in the matter of air traffic rules, as well as for the development and operation of air navigation facilities. The functions of the Airways Modernization Board would be transferred to the new Agency. Section 4 of the Air Commerce Act would be repealed.

Your committee believes that these provisions are of the utmost significance in making possible a truly safe and effective airspace regime.

*Independent decision making*

The splintering of airspace management in the past through committee and panel negotiation has already been discussed. It is one of the evils which this bill is designed to eliminate. As indicated above, it is for this reason that the bill proposes to vest in a single Administrator plenary authority for airspace management. If such authority is once again fractionalized and made subject to committee or panel decision, the evil will only be continued.

\* \* \* \* \*

It is fully expected, of course, that the Administrator will consult with other Government agencies in aviation matters which are of common concern. He will be available for service as an aviation expert where joint action or consultation with other interested departments or agencies of the Government is called for. Moreover, in areas in which he has been authorized to act with special authority, he will naturally confer with his own staff of experts, including military personnel assigned to the Agency. In this latter regard, the final action of the Administrator is expected to be both informed and considerate of the national interest. This section, therefore, is designed not to encourage arbitrary action but rather to prevent the abdication or the frustration of the special power which the Congress proposes to entrust to an informal Administrator.

*Airport site control*

Effective airspace management and planning is not a matter involving airborne craft alone. As a natural corollary it also involves the location of new airports, missile sites, etc., whose landing patterns or other airspace requirements may conflict with the present usage of airspace. . . .

Thus, section 308 provides, in substance, that no Federal funds shall be expended for the construction or substantial alteration of civil or military airports, missile sites, etc., until the location, plans, and layouts thereof have been approved by the Administrator. Civil airports receiving Federal funds, have been under such restriction since 1938, the date of the enactment of the existing Civil Aeronautics Act. The bill, therefore, merely extends to military airports the identical review of airport locations which has been uniformly practiced with reference to nonmilitary airports for two decades. With respect to civil airport construction which does not involve the expenditure of Federal funds, the bill would require that reasonable notice be given to the Administrator so that he might advise as to the effects of such construction upon properly planned airspace allocations and air navigation patterns.

. . . . .

The need for the Administrator's authority in this area is obvious. The responsibility for effective planning for airspace allocation and air traffic safety would be negated by preventing the Administrator from exercising an effective reviewing function over the location of airports. A scrambled situation could develop in the pattern of civil and military airports and related facilities without the necessary coordination which the bill proposes to entrust to the Administrator. Air safety is already threatened in some areas of the United States through unwise locations of civil and military airports and unless authority is centralized this situation could undermine the principal purpose of this bill.

. . . . .

Substantive changes made by your committee in the bill as originally introduced were principally those recommended by the executive branch in the proposals submitted during the course of committee hearings. These proposals are summarized in the President's message which is reprinted as an appendix to this report. The bill as reported differs from the executive proposals in only two important respects. As previously mentioned, the bill provides for a measure of positive control by the Administrator over the location of future military airfields and missile sites. Second, the bill retains primary responsibility for the conduct of accident investigations in the Civil Aeronautics Board, whereas the executive agencies recommended that the Administrator be responsible for the field work phase of investigations.

\* \* \* \* \*

#### APPENDIX A

THE WHITE HOUSE.

*To the Congress of the United States:*

Recent midair collisions of aircraft, occasioning tragic losses of human life, have emphasized the need for a system of air traffic management which will prevent, within the limits of human ingenuity, a recurrence of such accidents.

In this message, accordingly, I am recommending to the Congress the establishment of an aviation organization in which would be consolidated among other things all the essential management functions necessary to support the common needs of our civil and military aviation.

\* \* \* \* \*

A fully adequate and lasting solution to the Nation's air traffic management problems will require a unified approach to the control of aircraft in flight and the utilization of airspace. \* \* \*

The concept of a unified Federal Aviation Agency charged with aviation facilities and air traffic management

functions now scattered throughout the Government has won widespread support in the Congress and among private groups concerned with aviation.

• • • • •

In accordance with this congressional directive, it had been my intention to submit recommendations for a Federal Aviation Agency to the Congress early in the next session. The recent Maryland collision has made it apparent, however, that the need for action is so urgent that the consolidation should be undertaken now.

I therefore recommend that the Congress enact at the earliest practicable date legislation establishing a Federal Aviation Agency in the executive branch of the Government and that the new Agency be given the powers required for the effective performance of the responsibilities to be assigned to it.

• • • • •

I recommend that the Federal Aviation Agency be given full and paramount authority over the use by aircraft of airspace over the United States and its territories except in circumstances of military emergency or urgent military necessity.

To assure maximum conformance with the plans, policies and allocations of the Administrator with respect to airspace, I recommend that the legislation prohibit the construction or substantial alteration of any airport or missile site until prior notice has been given to the Administrator and he is afforded a reasonable time to advise as to the effect of such construction on the use of airspace by aircraft.

• • • • •

DWIGHT D. EISENHOWER.

THE WHITE HOUSE, *June 13, 1958.*

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APPENDIX B

The following documents were prepared by the committee staff for the use of the committee, and are reproduced here for the convenience of the Members of the Senate.

COMPARISON OF PRESIDENTIAL RECOMMENDATIONS AND  
PROVISIONS OF COMMITTEE AMENDMENT

1. *Creation of Federal Aviation Agency*

"I therefore recommend that the Congress enact at the earliest practicable date legislation establishing a Federal Aviation Agency in the executive branch of the Government and that the new Agency be given the powers required for the effective performance of the responsibilities to be assigned to it."

Corresponds to original proposal in S. 3880, retained in committee amendment.

• • • • •

12. *Paramount authority over use of airspace*

"I recommend that the Federal Aviation Agency be given full and paramount authority over the use by aircraft of airspace over the United States and its territories except in circumstances of military emergency or urgent military necessity."

Provided for in original S.3880 and retained in committee amendment. Provision for deviation from air traffic rules in the event of military emergency included, as recommended by the President, giving statutory sanction to present provisions of CAB rules.

13. *Location of airports*

"To assure maximum conformance with the plans, policies and allocations of the Administrator with respect to airspace, I recommend that the legislation prohibit the

construction or substantial alteration of any airport or missile site until prior notice has been given to the Administrator and he is afforded a reasonable time to advise as to the effect of such construction on the use of airspace by aircraft."

Involves change in the original provisions of S. 3880. Provisions of S. 3880 as to military airports are retained, with some modification and clarification, by the committee amendment and specific language recommended by the President rejected. Provision for notice adopted by committee amendment with respect to private airports in enforcing expenditure of Federal funds in lieu of original provision of S. 3880 on this subject.

#### PROPOSED COMMITTEE AMENDMENT TO S. 3880

• • • • •

A title-by-title summary of the salient provisions is as follows:

##### *Title I. General provisions*

No substantial change in existing law. Declaration of congressional policy is divided into two sections to govern both the Board and the new agency. Certain definitions have been modernized as contained in original bill and also as recommended by the Administration.

• • • • •

##### *Title III. Organization of Agency and powers and duties of Administrator*

Creates new Federal Aviation Agency to be headed by civilian Administrator, assisted by a Deputy Administrator who may be a member of the Armed Forces; provides for participation by military personnel in certain policymaking functions by direct assignment to the agency under agreements with the Department of Defense.

• • • • •

P.A. 59

Gives Administrator authority for civil and military use of airspace, operations of air navigation facilities, promulgation of air traffic rules, expenditure of Federal funds for civil and military airports and research and development in air traffic control and navigation.

• • • • •

*Title XI. Miscellaneous*

Reenacts present law without significant change.

• • • • •

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House of Representatives Report No. 2360  
August 2, 1958

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 3880), to create a Civil Aeronautics Board and a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

• • • • •

PURPOSE OF LEGISLATION

The principal purpose of this legislation is to establish a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations.

Therefore, it proposes to establish a separate Federal Aviation Agency with the powers described below. The new Agency would replace the present Civil Aeronautics Administration.

The Administrator of the new Federal Aviation Agency (1) would be given full responsibility and authority for the

advancement and promotion of civil aeronautics generally, including the promulgation and enforcement of safety regulations, and (2) would be charged with the management of the national airspace, including responsibility for establishing and enforcing air traffic rules and for the development and operation of air-navigation facilities. Appropriate military participation in the Agency is provided.

• • • • •

The new Federal Aviation Agency would be headed by a civilian Administrator with plenary authority to—

- (a) Allocate airspace and control its use by both civil and military aircraft;
- (b) Make and enforce air traffic rules for both civil and military aircraft;
- (c) Develop and operate a common system of air navigation facilities for both civil and military aircraft;
- (d) Make and enforce safety regulations governing the design and operation of civil aircraft.

#### BACKGROUND OF LEGISLATION

This is not hastily conceived legislation. Airspace use and airspace problems have been under consideration for a long time by this committee and the Senate Committee on Interstate and Foreign Commerce.

The magnitude and critical nature of the problem came first to general public notice, perhaps, as a result of the midair collision of two airliners over Grand Canyon on June 30, 1956, when 128 lives were lost. Following this disaster were fatal air crashes between civil and military aircraft operating under separate flight rules established in the Civil Air Regulations.

• • • • •

# DIVISION OF RESPONSIBILITY

Divided authority over airspace use forced the executive branch to resort to the committee method to solve, or attempt to solve, conflicts over airspace allocations. In 1946, Executive Order 9781 created the Air Coordinating Committee. This Committee, which can act only by unanimous consent, come to play an important role in airspace control, and diluted further the role of the Civil Aeronautics Administration and the Civil Aeronautics Board.

Under this system, airspace has been assigned on a case-by-case basis often resulting in delays and patchwork solutions to many critical airspace problems. For example, this Committee, in its investigation of the Grand Canyon accident, found that establishment of an airway over the heavily traveled route over Grand Canyon was being delayed by objections of the military made through an Air Coordinating Committee panel.

Clearly an agency is needed now to develop a sound national policy regarding use of navigable airspace by all users—civil and military. This agency must combine under one independent administrative head functions in that field now exercised by the President, the Department of Defense, the Department of Commerce, and the Civil Aeronautics Board.

It is also intended by this bill to eliminate divided responsibility and conflicts of interest that exist in other areas, particularly conflicts between civil and military agencies in the field of electronic aids to air navigation.

• • • • •

## NEED FOR LEGISLATION

Feeling the need for immediate action following the recent tragic air accidents, the chairman of this committee and Senator Monroney, chairman of the Subcommittee on Aviation of the Senate Committee on Interstate and For-

eign Commerce, introduced identical bills, H.R. 12616 and S. 3880 in the House and Senate, respectively, proposing a far-reaching reorganization of Federal airspace control activities.

• • • • •  
As introduced, H. R. 12616 proposed to:

1. Create a Federal Aviation Agency, an independent agency, directly responsible to the President and the Congress, headed by a single civilian administrator with prior aviation experience.

2. Give the Administrator authority to regulate the use of all airspace over the United States by both civil and military aircraft, and to establish and operate a unified system of air-traffic control.

• • • • •  
5. Transfer to the new Agency the present responsibility of the Civil Aeronautics Board for making and enforcing air safety rules, with provision for appeal to the Board from orders of the Administrator in certain instances.

• • • • •  
**SAFETY RULEMAKING AUTHORITY**  
• • • • •

How to insure the maximum possible safety and efficiency under proper regulations, impartially enforced, is one of the major problems in connection with this legislation.

It is a problem that has received the most careful consideration of this committee.

In giving consideration to these problems, the committee received views and suggestions from various segments of civil aviation, and from representatives of Government agencies concerned with both civil and military aviation.

Agreement was expressed regarding the need for a new agency to develop and operate a single system of air traffic

control for joint use civil and military aviation—a so-called common system. There was disagreement, however, over how much safety rulemaking authority should be given this new agency.

Representatives speaking for the executive branch recommended that the new agency be given full safety rulemaking authority without review by the Civil Aeronautics Board, to avoid duplication of effort and a division of authority that could result in further confusion over responsibility.

This position also was supported by the Air Transport Association and the General Aviation Facilities Planning Group, representing all civil flying other than the scheduled airlines and the large irregular carriers.

It is the intent of the legislation that the Administrator shall discharge his rulemaking powers in a fair and impartial manner to promote the public interest and to provide for the national defense. It is intended that these powers shall be exercised in accordance with constitutional and statutory safeguards applicable to other agencies of the Government that have been granted similar rulemaking authority by the Congress.

• • • • •

#### MILITARY PARTICIPATION IN NEW AGENCY

The question of the extent and nature of military participation in the new agency was perhaps the most difficult one faced by the committee. Integration of Department of Defense activities in the field of air traffic control into the new agency is important in the interest not only of the efficient use of air space, with its important national defense connotations, but is urgently needed for reasons of governmental economy.

• • • • •

MILITARY AIRPORTS

The section dealing with military airports and missile bases is of vital importance.

The implications of the section are more far reaching than might be apparent. The location and runway layout of an airport may seriously affect the use of the navigable airspace over a wide area. To give the Administrator authority to place restrictions on civil airports but leave him without any voice in the location or runway layout of a military airport or a missile site would deprive him of the authority he must have to carry out the intent of this legislation. To give the Administrator authority over the deployment of military air units would be going too far, however, and is not contemplated. Potential conflict in site location is the problem which this legislation attempts to meet.

Certainly the Administrator should have advance notice of any construction or airport alteration which might interfere with the use of navigable airspace. This will give him an opportunity to consult with appropriate agencies of the Department of Defense and to offer advice and suggestions regarding the elimination of any airspace-use problems presented. The Administrator is also required to advise with appropriate committees of the Congress where an airspace conflict may develop. Such action would give ample notice to the appropriate committees of the Congress which have responsibilities regarding recommendations as to policies and the appropriation of public funds.

In case of a disagreement between the Administrator and the Department of Defense, after due consideration of the points at issue, the disagreement can be taken to the President for his determination.

Clearly, if the arrangement provided in section 308(b) is to accomplish the purpose intended, the Military Estab-

ishment should not proceed with construction until the Administrator has been consulted and has had an opportunity to give the problem due consideration. In case of a disagreement, construction must be held in abeyance until the disagreement has been resolved by a recommendation by the President. Any other course would negate section 308 (b) and circumvent the clear intent of this legislation.

#### EFFECT OF REPEALS AND REENACTMENT

In proposing this legislation it is not the intention of the committee to either adopt or reject administrative interpretations or practices, or judicial decisions under the present law. The reenactment of provisions which are now in effect should be considered as an absolute neutral factor in any question of interpretation which may arise in the future.

From the standpoint of the continuity of the provisions of law involved in this legislation, insofar as they are not changed from the provisions of law being repealed, it is intended that the reenactment of such provisions shall be considered to have the same effect as though the new act were amending the Civil Aeronautics Act of 1938 to "read as follows."

#### TITLE-BY-TITLE SUMMARY OF THE COMMITTEE AMENDMENT

The following is a title-by-title summary of the substitute amendment reported by the committee, with particular reference to how it differs in substance from the provisions of existing law which this legislation proposes to repeal and reenact. Unless otherwise indicated, existing law referred to is the Civil Aeronautics Act of 1938, as that act has been modified by amendments and by presidential reorganization plans.

In the interest of brevity, no mention is made of substantive changes of a minor and noncontroversial nature

made by the committee amendment, or of technical and clarifying modifications. The technical modifications referred to include, among other things, the elimination of provisions which have become obsolete since 1938 or changes to bring about technical conformity with other provisions of law which have been enacted by Congress.

#### TITLE I. GENERAL PROVISIONS

• • • • •

The definition of the term "civil airway" in present law has been omitted and a definition of the term "Federal airway" has been added. It provides that the term shall mean a portion of the navigable airspace of the United States designated by the Administrator as a Federal airway. The term "Federal airway" has been substituted for the term "civil airway" in appropriate places throughout the committee substitute.

The definition of the term "navigable airspace" has been amended to include airspace needed to insure safety in takeoff and landing of aircraft.

• • • • •

• • • A new and separate declaration of congressional policy has been specifically directed to the Administrator of the Federal Aviation Agency in order to indicate the general policy of the Congress with respect to the performance of the powers and duties vested in him.

• • • • •

#### TITLE III. ORGANIZATION OF FEDERAL AVIATION AGENCY AND POWERS AND DUTIES OF ADMINISTRATOR

*Organization, administrative powers, etc.*

This title, which is almost entirely new, provides for the establishment of a new Federal Aviation Agency (hereinafter called the "Agency") under the direction of an Administrator and a Deputy Administrator, both of whom

are to be appointed by the President, by and with the advice and consent of the Senate. In order to assure, to the maximum extent possible, the independence of the Administrator in the discharge of his responsibilities under the bill, this title provides that he shall not submit his decisions for the approval, nor be bound by the decisions or recommendations, of any organization created by Executive order.

The compensation of the Administrator is fixed at the rate of \$22,500 per annum and, with respect to his qualifications, this title provides that he—

- (1) shall be a citizen of the United States;
- (2) shall, at the time of his nomination, be a civilian;
- (3) shall have had experience in a field directly related to aviation;
- (4) shall not have a pecuniary interest in, or own any stocks or bonds of, any aeronautical enterprise;
- (5) shall not engage in any other business, vocation, or employment; and
- (6) shall be appointed with due regard for his fitness to discharge the powers and duties vested in him.

• • • • •

It is provided that the Deputy Administrator shall perform such duties and exercise such powers as the Administrator may prescribe, and shall act as Administrator during the absence or disability of the Administrator.

The provisions with respect to the qualifications and status of the Deputy Administrator are identical with those prescribed for the Administrator, except that the Deputy Administrator may be an officer on active duty with the Armed Forces of the United States. • • •

• • • • •

This title also provides for direct participation by military personnel in the exercise of the functions of the Administrator relating to the regulation and protection of air traffic (including provision of air navigation facilities and research and development with respect thereto) and the allocation of airspace. \* \* \*

\* \* \* \* \*

### *General powers*

Under this title, the Administrator is required to prescribe air-traffic rules and regulations governing the flight of aircraft, a duty which the Civil Aeronautics Board is empowered to perform under existing law. This important change places the responsibility for the safe and efficient use of the navigable airspace of the United States by both civil and military aircraft primarily in the hands of the Administrator. It is also his responsibility under this title to acquire, establish, operate, and improve air-navigation facilities, to conduct related research and development activities, and to provide necessary facilities and personnel for the regulation of air traffic.

In addition, it is provided that no Federal funds shall be expended (other than for military purposes) for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area (including air-navigation facilities thereon) unless the Administrator certifies that such landing area (or air-navigation facility) is reasonably necessary for use in air commerce or in the interests of national defense. It is further provided that no military airport or landing area, or missile or rocket site, shall be acquired, established, or constructed, or any runway layout substantially altered, unless reasonable prior notice thereof is given to the Administrator so that he may advise with the Congress, and with other interested agencies, with respect to the effect of any such proposed action on the use of airspace by aircraft. In the case of

P.A. 69

any other airport, it is also provided that reasonable prior notice be given to the Administrator so that he may advise as to the effect on the use of airspace by aircraft. \* \* \*

\* \* \* \* \*

TITLE XI. MISCELLANEOUS

This title contains provisions dealing with hazards to air commerce, the effect of international agreements on the exercise of powers and duties vested in the Board and the Administrator, the nature and use of documents filed with the Board, public use of air navigation facilities owned or operated by the United States, the navigation of foreign aircraft in the United States, and the application of certain laws relating to foreign commerce.

\* \* \* \* \*

APPENDIX

AGENCY REPORTS

The committee received and considered the following letters in connection with this legislation:

EXECUTIVE OFFICE OF THE PRESIDENT,

BUREAU OF THE BUDGET  
Washington, D. C. July 28, 1958.

HON. OREN HARRIS,

*Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D. C.*

MY DEAR MR. CHAIRMAN: This will acknowledge your letter of July 17, 1958, inviting the Bureau of the Budget to comment on S. 3880, a bill to create a Civil Aeronautics Board and a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft.

P.A. 70

The bill substantially conforms with recommendations of the President contained in his message transmitted to the Congress on June 13, 1958. These recommendations were incorporated in H. R. 12616 and proposed amendments thereto presented to your committee on behalf of the administration by the Chairman of the Airways Modernization Board.

You are therefore advised that the enactment of S. 3880 would be in accord with the program of the President.

Sincerely yours,

PHILLIP S. HUGHES,  
*Assistant Director for Legislative Reference.*

• • • • •

DEPARTMENT OF THE AIR FORCE,  
OFFICE OF THE SECRETARY,  
*Washington, D. C., July 23, 1958.*

HON. OREN HARRIS,

*Chairman, Interstate and Foreign Commerce Committee,  
House of Representatives.*

DEAR MR. CHAIRMAN: I refer to your request for the comments of the Department of Defense on S. 3880, an act to create a Civil Aeronautics Board and a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation in such manner as to best foster its development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, which was referred to your committee on July 15, 1958. The Secretary of Defense has delegated to this Department the responsibility for expressing the views of the Department of Defense on this matter.

• • • • •

This Department feels it is of great importance that this proposed legislation establishing a Federal Aviation Agency be enacted during this session of Congress. It is urgent that the Congress set up at the earliest date a single

agency with the broad authority to support common needs of civil and military aviation in the United States and to provide for the safe and efficient use of the airspace, taking into full account both the military requirements for national defense and the needs of civil aviation. S. 3880, as referred to your committee, effectively accomplishes these objectives.

S. 3880 represents, in the opinion of the Department of Defense, an excellent balancing of the civil and military interests involved in national aviation, with the objective of achieving effective joint planning and greater safety and efficiency in the use of the airspace. \* \* \*

\* \* \*

MALCOLM A. MACINTYRE,  
*Under Secretary.*

\* \* \*

CIVIL AERONAUTICS BOARD,  
*Washington, July 29, 1958.*

HON. OREN HARRIS,

*Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D. C.*

DEAR CONGRESSMAN HARRIS: The Board is in receipt of your letter of July 17, 1958, requesting our views in connection with S. 3880, as passed by the Senate, a bill to create a new Federal Aviation Agency.

\* \* \*

It is difficult to believe that Congress would be willing to transfer to the executive branch the quasi-legislative rule-making function which it has seen fit to vest in the Civil Aeronautics Board without providing for reasonable safeguards. The Congress, and particularly your committee, has shown deep concern over the question of whether the regulatory agencies are exercising their quasi-legislative

and quasi-judicial functions independently of the executive branch. In our testimony before your committee, we pointed out that the firm stand which you and your colleagues have taken was of considerable assistance to the Board in enabling it to assert its legislative authority in the field of safety rulemaking, particularly with respect to the recent airspace regulation. S. 3880 would turn over to the executive branch not only the entire control of airspace, the very matter which the Board, after difficult and painstaking consultations with the military, was able to free from executive control, but all of the safety rulemaking as well.

• • • • •

One of the most troublesome aspects of S. 3880, and one which could have a serious impact on the local service and smaller trunkline carriers, is the failure of the proposed bill to give any consideration to balancing the equities between economic and safety considerations insofar as safety rulemaking is concerned. S. 3880 completely ignores this basic concept which is one of the underlying philosophies of the Civil Aeronautics Act. Under the proposed bill the Administrator would issue safety regulations but would not be competent, nor would he be expected, to weigh the economic aspects. • • •

• • • • •

The Board is strongly of the view that the military should have no direct responsibility in the field of safety rulemaking. There is a place for the participation by the military in the regulatory process but not in the making of a final independent decision. The Defense Establishment is the largest and one of the most important users of the airspace. S. 3880 ignores the fact that there are other important users such as the certificated air carriers, the supplemental carriers, general aviation, and the private flyer who are also vitally concerned with the allocation of airspace. At the present time all of the users of the air-

P.A. 73

space have an equal opportunity to participate in rule-making proceedings, with the final decision resting in the Civil Aeronautics Board. It is the Board's view that the final decision should be made by a truly independent quasi-legislative agency of the Congress and that this function should not be shared by any party in interest.

• • • • •

Sincerely yours,

JAMES R. DUFFEE,  
*Chairman.*

## **JOINT APPENDIX**



J.A. (i)

JOINT APPENDIX

TABLE OF CONTENTS

	Page
FAA's "Cooperative Survey of Airport Information on Facilities and Services" with respect to Freeway Airport, dated June 30, 1961 .....	J.A. 1
Pepco's "Notice of Proposed Construction or Alteration", dated Dec. 26, 1961 .....	J.A. 2
Memorandum, dated Jan. 10, 1962, from Chief, Airport's Branch, FAA, to Chief, Air Traffic Division, FAA .....	J.A. 3
FAA letter to Pepco, dated Feb. 16, 1962, advising as to preliminary determination of hazard to air navigation .....	J.A. 4
Pepco letter to FAA, dated Mar. 5, 1962, requesting aeronautical study .....	J.A. 6
FAA memorandum, dated Mar. 14, 1962, circularizing Pepco proposal for comment .....	J.A. 7
Plat of Freeway Airport, showing Pepco's proposed power lines .....	J.A. 9
Miscellaneous memoranda and letters to FAA commenting on Pepco's proposal .....	J.A. 10-13
FAA letter, dated April 26, 1962, distributing agenda for May 15, 1962 FAA Airspace Meeting .....	J.A. 14
Agenda Item No. 10 for May 15, 1962 FAA Airspace Meeting .....	J.A. 15
FAA memorandum, dated June 8, 1962, as to Agenda Item No. 10 at May 15, 1962 FAA Airspace Meeting .....	J.A. 16
Determination of Hazard to Air Navigation, issued October 19, 1962 .....	J.A. 17
Pepco Petition for Public Hearing, dated Nov. 16, 1962 .....	J.A. 19
Rodenhauser Answer to Pepco Petition for Public Hearing .....	J.A. 24
FAA letter to Pepco, dated Feb. 1, 1963, denying Petition for Public Hearing .....	J.A. 26
Petition for Review by Court of Appeals .....	J.A. 27
Stipulation of issues before Court of Appeals .....	J.A. 32
Prehearing Order .....	J.A. 34
Rodenhauser Petition for Leave to Intervene .....	J.A. 35
Order granting leave to intervene .....	J.A. 37



J.A.1

**FAA's "Cooperative Survey of Airport Information on Facilities  
and Services" With Respect to Freeway Airport.  
Dated June 30, 1961**

FEDERAL AVIATION AGENCY COOPERATIVE SURVEY OF AIRPORT INFORMATION ON FACILITIES AND SERVICES				Form Approved Bulge Survey No. 41-11577-1	
CITY OR TOWN <b>Mitchellville</b>		ZIP <b>85955</b>	COUNTY <b>Prince George</b>	STATE <b>Maryland</b>	
AIRPORT NAME <b>Freeway</b>			NAME OF AERONAUTICAL SECTIONAL CHART ON WHICH AIRPORT WOULD BE SHOWN <b>Washington</b>		
GEOGRAPHIC POSITION		ELEVATION	DESCRIPTIVE LOCATION		
LATITUDE <b>38° 56'</b>	LONGITUDE <b>76° 46'</b>	<b>160'</b>	<b>S</b> STATUTE MILES <b>5</b> FROM <b>Mitchellville</b> (Direction) (City or Town)		
IDENTIFYING LANDMARKS			IS AIRPORT ATTENDED ON REGULAR SCHEDULE <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO If "Yes" indicate schedule: MONTH _____ DAYS _____ HOURS <b>24</b>		
			IS AIRPORT OPEN TO THE GENERAL PUBLIC <input checked="" type="checkbox"/> YES <input type="checkbox"/> ANYTIME <input type="checkbox"/> EMERGENCY <input type="checkbox"/> NO <input type="checkbox"/> OTHER _____		
			NO. AIRCRAFT BASED CIVIL AIRCRAFT SINGLE ENGINE <b>9</b> MULTI ENGINE <b>0</b> TOTAL <b>9</b>		
R/WAY DIRECT	R/WAY LENGTH	R/WAY WIDTH	TYPE SURFACE	OBSTRUCTIONS (Buildings, Trees, Poles, Lines, etc.)	
<b>N/S</b>	<b>3400'</b>	<b>100'</b>	<b>Sod</b>	<b>None</b>	
<b>NW/SE</b>	<b>2000'</b>	<b>85'</b>	<b>Sod</b>		
<b>NE/SW</b>	<b>1800'</b>	<b>100'</b>	<b>Sod</b>		
LIGHTING <b>NONE</b>			PRINCIPAL FACILITIES		
<input type="checkbox"/> ROTATING BEACON	COLOR	OPERATING SCHEDULE	FUEL CAPACITY IN GALLONS BY OCTANE		
			<b>1000</b>	<b>100/87</b>	<b>100/100</b>
<input type="checkbox"/> BOUNDARY			IS HANGAR SPACE AVAILABLE <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
<input type="checkbox"/> OBSTRUCTION			REPAIRS: AIRCRAFT <input type="checkbox"/> MAJOR <input checked="" type="checkbox"/> MINOR <input type="checkbox"/> ENGINE <input type="checkbox"/> MAJOR <input checked="" type="checkbox"/> MINOR		
<input type="checkbox"/> FLOOD			WEATHER DATA: <input type="checkbox"/> TELETYPE <input type="checkbox"/> STATION <input type="checkbox"/> PHONE <input checked="" type="checkbox"/> NONE <input type="checkbox"/> UNICOM <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
<input type="checkbox"/> RUNWAY	<input type="checkbox"/> MI <input checked="" type="checkbox"/> MCG <input type="checkbox"/> LG		WIND DIRECTION INDICATOR: <input checked="" type="checkbox"/> TIE <input checked="" type="checkbox"/> CONE <input type="checkbox"/> TETRANE WIND <input type="checkbox"/> LIGHTED <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		
<input type="checkbox"/> THRESHOLD			IS AIRPORT LICENSED BY THE STATE <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		
<input type="checkbox"/> PARKWAY			If "Yes" check classification assigned: <input type="checkbox"/> MUNICIPAL <input checked="" type="checkbox"/> COMMERCIAL <input type="checkbox"/> PRIVATE <input type="checkbox"/> PERSONAL USE		
<input type="checkbox"/> APPROACH			DO YOU WANT THIS AIRPORT SHOWN ON AERONAUTICAL CHARTS <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		
Your Name and Title <b>Owner</b> <b>Quinn Rodenhausen</b>			Mailing Address <b>RT 1 - Box 163</b> <b>Mitchellville Md</b>		Date <b>6/30/61</b>

DPO 881041

Form FAA-29a-1 (10-57)

J.A. 2

**PEPCO's "Notice of Proposed Construction or Alteration."**  
**Dated December 26, 1961**

Form approved by Bureau of Budget No. 04-70001-1

<b>FEDERAL AVIATION AGENCY</b>  <b>NOTICE OF</b> <b>PROPOSED CONSTRUCTION OR ALTERATION</b>  <b>PART 626, REGULATIONS OF THE ADMINISTRATOR</b>	<small>NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., PROPOSING CONSTRUCTION OR ALTERATION DESCRIBED BELOW</small> <b>Potomac Electric Power Company</b> <small>ADDRESS (Number, Street, City, Zone, State)</small> <b>929 E Street, N. W.</b> <b>Washington 4, D. C.</b>
---	--

**A. TYPE OF STRUCTURE**

**1. CHECK APPLICABLE ITEM**

☒ **NEW CONSTRUCTION**
     
 ☐ **ALTERATION** (*Change in height only*)
     
 ☒ **PERMANENT**
     
 ☐ **TEMPORARY**

**2. NATURE AND COMPLETE DESCRIPTION**

The construction proposed at this location is two double circuit 230,000 volt transmission lines supported on steel towers. Tower heights approximate 125 feet above ground surface and spans between towers average about 800 feet. The towers and transmission circuits will be located upon a 250 foot right of way strip purchased from the Edward S. Walker Estate. These lines, connecting a new generating site at Chalk Point to an existing substation at Burtonsville, were planned in 1957 at which time there was no indication of an airport on the Rodenhauser property.

**B. LOCATION OF STRUCTURE** (*Submit a map or sketch*)

<b>1. LATITUDE</b>	<b>2. LONGITUDE</b>	<b>3. NEAREST CITY OR TOWN, AND STATE</b>	<b>4. RELATION TO NEAREST TOWN OR CITY</b>	
		<b>See plat attached</b>	<b>DIRECTION</b>	<b>DISTANCE</b>
<small>(To nearest second)</small>				
<b>5. NAME OF NEAREST LANDING AREA</b>			<b>6. RELATION TO NEAREST BOUNDARY OF LANDING AREA</b>	
			<b>DIRECTION</b>	<b>DISTANCE</b>

**7. PROVIDE THE LAND RECORDER'S MAP DESCRIPTION AND/OR LEGAL DESCRIPTION BY METES AND BOUNDS OF PROPERTY ON WHICH STRUCTURE WILL BE OR IS LOCATED (If more space is necessary, use reverse side or continue on a separate sheet of paper and attach to this form.)**

See Exhibit 'A' attached hereto.

See also deed from Anne O. Walker, et al, to Potomac Electric Power Company, dated May 25, 1960, recorded on June 6, 1960 in Liber 2453, Folio 110.

<b>8. DATE WORK WILL BE STARTED</b>	<b>9. DATE WORK WILL BE COMPLETED</b>	<b>10. OVERALL HEIGHT (IN FEET) OF COMPLETED STRUCTURE ABOVE</b>		
<b>November 1, 1961</b>	<b>First Line early in 1963.</b>	<b>A. GROUND LEVEL</b>	<b>B. MEAN WATER LEVEL (IF SO SITUATED)</b>	<b>C. MEAN SEA LEVEL</b>
		<b>125 feet, more or less</b>		
<b>11. CHECK WHETHER COMPLETED STRUCTURE WILL BE</b>				
<b>A. MARKED FOR THE PROTECTION OF AIR NAVIGATION.....</b>			<b>YES</b>	<b>NO</b>
<b>B. PAINTED AS SPECIFIED IN OBSTRUCTION MARKING MANUAL.....</b>				<b>X</b>
<b>C. LIGHTED AS SPECIFIED IN OBSTRUCTION MARKING MANUAL.....</b>				<b>X</b>
<b>C. CERTIFICATION:</b> I hereby certify that all of the above statements made by me are true, complete, and correct to the best of my knowledge.				
<b>DATE</b>	<b>SIGNATURE OF PERSON MAKING CERTIFICATION</b>		<b>TITLE</b>	
<b>December 26, 1961</b>	<b>/s/ R. L. BORTNER</b> <b>R. L. Bortner</b>		<b>Manager,</b> <b>Real Estate Department.</b>	

J.A. 3

Memorandum, Dated January 10, 1962, from Chief, Airport's  
Branch, FAA, to Chief, Air Traffic Division, FAA

FEDERAL AVIATION AGENCY  
UNITED STATES GOVERNMENT

MEMORANDUM Date: Jan. 10, 1962

Subject: Proposed PEC Power Line  
Mitchellville, Maryland

From: Chief, Airports Branch

To: Chief, Air Traffic Division, EA-500

Attn.: Chief, Airspace Utilization Branch, EA-550

For your further processing, we are attaching two copies of a Notice of Construction, Form FAA-117, with accompanying property drawing and description for a proposed double circuit 230KV transmission line at the subject location.

The proposed line would run adjacent to the Freeway Airport located on the Rodenhauser property shown on the attached property drawing. We have asked the District Airport Engineer to submit a drawing of the Freeway Airport showing its relation to the proposed power line. We will forward this to you when it is received.

The Freeway Airport has not received airspace clearance in accordance with Part 625 of the Regulations of the Administrator. The District Airport Engineer transmitted Forms FAA-2681 to Mr. Irwin Rodenhauser on December 11, 1961, and requested that he complete the forms so that an airspace review could be accomplished for his airport. No reply has been received.

JOSEPH W. MOTT, JR., EA-490

Attachments.

J.A. 4

**FAA Letter to Pepco, Dated February 16, 1962, Advising as to  
Preliminary Determination of Hazard to Air Navigation**

**FEDERAL AVIATION AGENCY  
EASTERN REGION  
FEDERAL BUILDING  
NEW YORK INTERNATIONAL AIRPORT  
JAMAICA, NEW YORK**

**February 16, 1962**

**Subject: Power Line  
Mitchellville, Md.  
Case No. 1-OE-1202**

**Mr. R. L. Bortner  
Manager, Real Estate Department  
Potomac Electric Power Company  
929 E Street, N.W.  
Washington 4, D.C.**

**Dear Mr. Bortner:**

We have studied the proposal described in your Form FAA-117, dated December 26, 1961, with attachments. Structural heights exceed the criteria of hazards to air navigation in Part 626.13(a)(1) and (b)(2), Regulations of the Administrator, as applied to Freeway Airport. Consequently, a preliminary determination has been made that this construction will constitute a hazard to air navigation.

The proposed power line, if constructed alongside the boundary of the airport, will conflict with the runway approach surfaces for all four runways. The degree of criteria violation varies from approximately 63 feet to 125 feet above ground (over-all height above ground indicated on Form FAA-117). In telephone conversation, you stated it would be completely impractical to place the power line underground. As an alternative, the possibility of relocation might be considered.

J.A. 5

If you do not choose to relocate the proposed construction, you may request an aeronautical study within thirty days of the date of this letter. In the absence of such a request, the preliminary determination herein stated will become final.

Sincerely,

FRANK SCHAEFER

for CHARLES H. NEWPOL  
Chief, Airspace Utilization  
Branch

J.A. 6

**Pepco Letter to FAA, Dated March 14, 1962, Requesting  
Aeronautical Study**

POTOMAC ELECTRIC POWER COMPANY  
929 E STREET, NORTHWEST  
WASHINGTON 4, D. C.

GEORGE BISSET  
Senior Vice President

March 5, 1962.

Federal Aviation Agency,  
Eastern Region,  
Federal Building,  
New York International Airport,  
Jamaica,  
New York.

*Attention: MR. CHARLES H. NEWPOL.*

Re: Power Line, Mitchellville, Md.,  
Case No. 1-OE-1202.

Dear Sirs:

We refer to the letter dated February 16, 1962 addressed by your Mr. Newpol to our Mr. Bortner in connection with the above matter.

Pursuant to § 626.31(a)(1) of your regulations, we hereby request an aeronautical study of the effect of our proposed structures on the use of the navigable airspace by aircraft.

Very truly yours,

POTOMAC ELECTRIC POWER COMPANY

By GEORGE BISSET  
*Senior Vice President*

CM:ICS

J.A. 7

**FAA Memorandum, Dated March 14, 1962, Circularizing  
Pepco Proposal for Comment**

**FEDERAL AVIATION AGENCY  
EASTERN REGION  
FEDERAL BUILDING  
NEW YORK INTERNATIONAL AIRPORT  
JAMAICA, NEW YORK**

March 14, 1962

**To: All Interested Parties**

**SUBJECT: Special Aeronautical Study; Case No. 1-OE-1202**

The Federal Aviation Agency has been asked to determine the effect on aeronautical activity which may be created by the following proposed construction:

**Proponent: Potomac Electric Power Company**

**Description: Electrical transmission line supported on steel towers**

**Location: Adjacent to Freeway Airport, Mitchellville, Md.**

**Latitude—38°57' N**

**Longitude—76°46' W**

**Height: Above Ground—See Attached Plan  
Above Mean Sea Level—See Attached Plan**

**Aeronautical Chart: Freeway Airport Plan Attached.**

Your review of this proposal will be appreciated. Concurrence may be indicated by use of the endorsement below. If you wish to interpose objection to the proposal, a separate letter setting forth valid aeronautical reasons should be provided.

J.A. 8

Replies received not later than April 6, 1962 will be considered before final action is taken on this proposal. Please address reply to Chief, Airspace Utilization Branch, EA-550.

FRANK SCHAEFER  
for CHARLES H. NEWPOL  
Chief, Airspace Utilization  
Branch, Air Traffic Division

Attachment

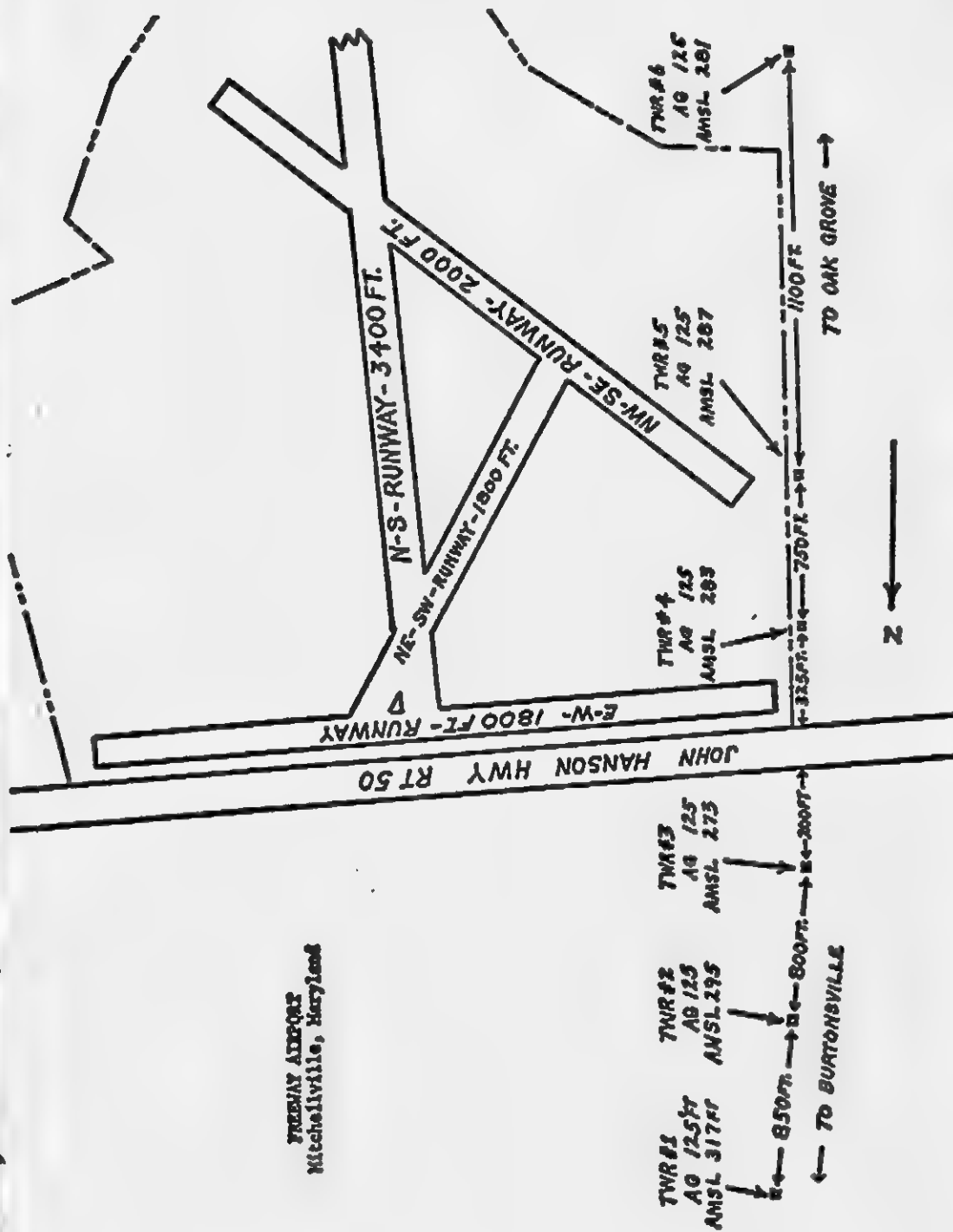
The above proposal has been reviewed and no objections are interposed.

SIGNED ..... DATE .....

REPRESENTING .....

J.A. 9

Plat of Freeway Airport, Showing Pepco's Proposed Power Lines



J.A. 10

Miscellaneous Memorandum and Letters to FAA  
Commenting on Pepco's Proposal

AOPA

AIRCRAFT OWNERS AND PILOTS ASSOCIATION  
Washington 14, D. C.

March 26, 1962

Mr. Charles H. Newpol  
Chief, Airspace Utilization Branch  
Air Traffic Division  
Federal Aviation Agency  
Federal Building, N.Y. Int'l Airport  
Jamaica, New York

Dear Mr. Newpol:

Reference is made to Special Aeronautical Study Case No. 1-OE-1202 which presents a proposal to construct a powerline along the west side of the Freeway Airport, Mitchellville, Maryland.

The Aircraft Owners and Pilots Association vigorously opposes the construction of a powerline in such a location as is proposed in this case. This powerline is within a few feet of the ends of two runways of the Freeway Airport. Construction of such a powerline would render these two runways unusable for landing in either direction and unusable for takeoffs to the west.

In view of the violation of Part 626 of the Administrator's Regulations, an aeronautical study is recommended.

Cordinally,

R. G. ARMSTRONG  
R. G. Armstrong  
*Airspace and Liaison*

J.A. 11

FEDERAL AVIATION AGENCY  
UNITED STATES GOVERNMENT

MEMORANDUM Date: 26 March 1962

Subject: Special Aeronautical Study; Case No. 1-OE-1202  
From: U. S. Army Airspace Representative  
To: Chief, Airspace Utilization Branch, EA-550

1. The Army has no immediate interest in the Freeway Airport at Mitchellville, Maryland. However, the proposed construction would apparently present a hazard to operations, and the Army will support any objections based upon aviation safety.

ROBERT D. HYMAN  
Robert D. Hyman  
*Major, GS*  
*U. S. Army Airspace Representative*

Attachment

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NATIONAL PILOTS ASSOCIATION  
1025 CONNECTICUT AVENUE, N.W.  
WASHINGTON 6, D. C.

March 30, 1962

Chief, Airspace Utilization Branch  
Federal Aviation Agency  
New York International Airport  
Jamaica, New York

Case 1-OE-1202

Dear Sir:

With respect to Airspace Case No. 1-OE-1202 giving details of a proposed power line to be erected adjacent to the Freeway Airport at Mitchellville, Maryland, we would like to file objections from an aeronautical standpoint for the following reasons.

1. The erection of these power lines in the proposed location would cause the closing of the east-west runway,

the northwest runway, the southeast runway, and possibly the southwest-northeast runway.

2. Should the above mentioned runways be allowed to remain open the glide angle over the wires will be too steep for length of the runways, thereby imposing a hazardous condition.

3. According to the wind rose of the Freeway Airport, during the months of October through April the wind is out of the northwest which means that the northwest runway is essential for the safe operation of the airport. Upon the erection of these wires, the elimination of the northwest runway would be necessitated.

4. As far as the airport appearance is concerned these lines would be a definite hindrance.

5. Freeway has been a licensed airport since May, 1959. In addition there has been an active runway (east and west) since the year 1946.

6. Due to its location Freeway may become one of the foremost general aviation airports in the metropolitan Washington area.

For these reasons we oppose the erection of the power lines in their proposed location. It would be our own wish that the power company would locate their lines in a place or in such a manner that they would not prove detrimental to the operation of the Freeway Airport.

Yours very truly,

DAVID H. SCOTT

David H. Scott

*Executive Vice President*

DHS:dg

cc: A. Bruce Boehm

George W. Brewster

Irvin R. Rodenhanser

J.A. 13

AIRSPACE DOCKET REPLY FORM  
Flight Standards Field Division No. 1  
Region One

Docket No. 1-OE-1202

Case No.

Date: April 10, 1962

To: Chief, Airspace Utilization Branch, EA-550  
From: Chief, Aircraft Management Branch  
Subject: Construction of Transmission Lines—Freeway  
Airport, Mitchelville, Md.

Date  
Recvd.

COMMENTS:

We oppose any construction this close to the end of runways. Our investigation of the proposal has been coordinated with the airports owner and the Maryland Aviation Commission. A flight study of the area indicates the effective glide angle is too steep on approach for landing on the east-west runway and for landing on the northwest-southeast runway. Therefore, the proposed installation of these lines will cause the closing of these two runways. According to wind information, the months of October through April require operation to and from the northwest runway.

H. HELFRICH  
for E. E. BLANCHARD, EA-220

FAA NY-1106 (3/61)

J.A. 14

**FAA Letter, Dated April 26, 1962, Distributing Agenda for  
May 15, 1962 FAA Airspace Meeting**

**FEDERAL AVIATION AGENCY  
EASTERN REGION  
FEDERAL BUILDING  
NEW YORK INTERNATIONAL AIRPORT  
JAMAICA, NEW YORK**

April 26, 1962

**To: All Participants, FAA Airspace Meeting**

**SUBJECT: Agenda for Informal FAA Airspace Meeting  
No. 30 to be held May 15, 1962**

Our next meeting will be on Tuesday, May 15, 1962, at 10:00 A.M. in Conference Room 16, FAA Headquarters, Federal Building, New York International Airport, Jamaica 30, New York. Conference Room 16, on street level, is best reached by the South Entrance to the Building.

These meetings give aviation interests the opportunity to comment on agenda items proposed for formal airspace action.

We urge your attendance. We solicit your ideas and recommendations. Active participation will promote better understanding and provide constructive discussion helpful in resolving problems.

**CHAS. H. NEWPOL**

**for JOSEPH J. REGAN  
Chief, Air Traffic Division**

FAA AIRSPACE MEETING NO. 30

May 15, 1962

Agenda Item No. 10

MITCHELLVILLE, MARYLAND—PROPOSED CONSTRUCTION OF  
230 KV TRANSMISSION LINE; CASE No. 1-OE-1202

DISCUSSION:

1. The Federal Aviation Agency is conducting an aeronautical study to determine the effects on airspace utilization of the following proposal:

Applicant: Potomac Electric Power Company

Location: Mitchellville, Maryland

Height: Above Ground } See attached  
Above Mean Sea Level } sketch.

2. The applicant proposes to construct two double circuit 230 KV transmission lines supported on steel towers, 125 feet above ground and spanned approximately 800 feet apart. The towers and transmission circuits will be located upon a 250 foot right of way strip which abuts the property line of the Freeway Airport, Mitchellville, Maryland.
3. Our preliminary study indicated that the section which passes west of Freeway Airport would exceed the hazard criteria of Part 626.12(a)(6) as applied to all of the runways at this airport. (See attached sketch for relative proximity of transmission line and runways.)
4. This proposal was circularized for aeronautical comment by letter, dated March 14, 1962.
5. Aeronautical objections were made in response to the circularization based upon the conclusion that the proposed construction immediately adjacent to the Freeway Airport would necessitate closing the E/W and NW/SE runways and create a hazardous operating condition for the remaining runways.
6. Additional written formal comments to be included in the record will be accepted prior to or at the meeting.

J.A. 16

FEDERAL AVIATION AGENCY  
UNITED STATES GOVERNMENT

**Memorandum**

Date: June 8, 1962

Subject: FAA Airspace Meeting No. 30—May 15, 1962

From: Program Coordinator, Airspace Utilization  
Branch

To: Files

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*Agenda Item No. 10*

Mitchellville, Maryland—Proposed Construction of 230  
KV Transmission Line; Case No. 1-OE-1202

The proposal and written comments to our circularization were reviewed. User representatives were advised that the proposal penetrated the approach surfaces of all four runways of the Freeway Airport, Mitchellville, Maryland. The proximity to the East/West and Northwest/Southeast Runways was such that the erection of the transmission line would negate the use of these runways. Approaches to and departures from the Northeast/Southwest Runway would be seriously compromised.

Mr. Cornelius Means, Counsel for the Potomac Electric Power Company, took the position that the Freeway Airway was, in fact, not an airport because the authority to operate as such had never been given by the Planning Board, Prince George County, Maryland. Mr. Means felt a decision relevant to the erection of the transmission line at the proposed location, hinged on the legal existence of the airport. This necessitated obtaining a special exception from the Zoning authorities. He stated, further, that the cost of placing the line underground was prohibitive and not technically feasible because of the high voltage involved.

Mr. Merrill Armour, Counsel for Irvin Rodenhauser, owner of Freeway Airport, replied that the airport is licensed

by the State of Maryland and does not require special zoning authorization. The airport dates back to 1942 and was licensed in 1959; there are about 20 planes based at the airport.

The Chairman made the point that the issue is not whether the airport legally exists but, rather, does the proposal present a hazard to the airport. The legality of the airport as it pertains to the Zoning laws, is related to the jurisdiction of the Zoning Board. We are not in the position to pass on the validity of the Zoning regulations.

After much discussion which emphasized continually the validity of the airport, particularly between the attorneys for the proponent and the airport, the following comments on the proposal were made:

AOPA—assuming the airport is operating legally, it is a hazard.

U.S. Navy—if 626 is valid, valid objection.

NBAA—no comment.

NPA—oppose it as constituting a hazard to the airport.

JOHN F. LEE  
JOHN F. LEE, EA-551

• • • • •

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FEDERAL AVIATION AGENCY

**Determination of Hazard to Air Navigation**

(OE Docket No. 62-EA-4)

The Federal Aviation Agency has circularized the following proposal for aeronautical comment and has conducted a study to determine its effect upon the safe and efficient utilization of airspace.

The Potomac Electric Power Company proposes to construct two double circuit 230,000 volt transmission lines

and supporting steel towers near Mitchellville, Maryland, aligned in a north/south direction near latitude 38° 56' 00" north, longitude 76° 46' 00" west, at an over-all height of 235 feet above mean sea level (125 feet above ground).

Based upon the aeronautical study, it is the finding of the Agency that the proposed structures, which would be constructed within a 250-foot wide strip of property adjoining the Freeway Airport, Mitchellville, Maryland, would render the East/West and Northwest/Southeast runways unusable, would derogate the use of the Northeast/Southwest runway, and would have a substantial adverse effect upon aeronautical operations at the Freeway Airport.

Pursuant to the authority delegated to me by the Administrator (14 CFR 626.33) it is found that the proposed structure would have a substantial adverse effect upon aeronautical operations at the Freeway Airport and it is hereby determined that the proposed structure would be a hazard to air navigation.

This determination is effective as of the date of issuance and will become final 30 days thereafter unless an appeal is filed under Section 626.34 (14 CFR 626.34). If the appeal is denied, the determination will then become final as of the date of the denial or 30 days after the issuance of the determination, whichever is later.

JOSEPH VIVARI

Joseph Vivari, *Acting Chief*

*Obstruction Evaluation Branch*

Issued in Washington, D. C., on October 19, 1962

BEFORE THE ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY

OE Docket No. 62-EA-4

In the Matter of

POTOMAC ELECTRIC POWER COMPANY

Determination of Hazard to Air Navigation

**Petition for Public Hearing**

The undersigned, Potomac Electric Power Company, the sponsor of the proposed construction project referred to in the above-captioned Determination,\* hereby petitions the Administrator of the Federal Aviation Agency, pursuant to the provisions of § 626.34 of the Regulations of the Administrator (14 CFR 626.34), for a public hearing for the purpose of obtaining a formal decision of the Administrator on the matter, and as grounds therefor states that:

1. The Petitioner is a District of Columbia and Virginia corporation having its principal place of business at 929 E Street, Northwest, Washington 4, D. C. It is engaged in the generation, transmission, distribution and sale of electric power and energy in the District of Columbia and in the States of Maryland and Virginia, and is subject to regulation by the Public Utilities Commission of the District of Columbia, the Public Service Commission of Maryland, the State Corporation Commission of Virginia and the Federal Power Commission.

2. The Petitioner is the sole supplier of electric power and energy to the public (including most of the buildings, installations and facilities of the United States Government located in the Petitioner's service area) in the District of Columbia, in a small portion of Arlington County,

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\* F.R. Doc. 62-10849, published in the Federal Register, issue of October 31, 1962 (Volume 27, No. 212), at page 10593.

Virginia, and in large portions of Montgomery and Prince George's Counties, Maryland. Attached hereto as Exhibit A is a general map of the Petitioner's service area and electric system dated August 31, 1962.

3. The Petitioner presently owns and operates steam-electric generating stations, having an aggregate net capability of 1,564,500 kilowatts, located on the Potomac River in Alexandria, Virginia, on the Anacostia River at Benning and Buzzard Point in the District of Columbia and on the Potomac River at Dickerson, Montgomery County, Maryland.

4. The Petitioner's electric system is presently, and for many years past has been, interconnected with that of Baltimore Gas and Electric Company through various tie lines, the principal one of which is a 230,000 volt, steel tower transmission line extending between the Petitioner's Burtonsville Substation No. 120 in Prince George's County, Maryland, and the Howard Substation of said Baltimore Gas and Electric Company near Ellicott City, Maryland.

5. In June, 1959, the Petitioner placed in service the first generating unit at its Dickerson, Maryland, generating station. Such generating station is connected with the Petitioner's electric system by means of two 230,000 volt, steel tower, transmission lines extending between said generating station and the Petitioner's said Burtonsville Substation No. 120.

6. As indicated above, the aggregate net capability of the Petitioner's existing generating facilities is 1,564,500 kilowatts. On August 21, 1962 the Petitioner's gross 60-minute integrated peak load reached a new high of 1,395,000 kilowatts. Since during the past ten years the Petitioner has experienced an average annual growth in its peak load of approximately 9% it is essential that the Petitioner place additional generating facilities in operation prior to the Summer of 1964 (the Summer being the

period during which the Petitioner experiences its annual peak load).

7. The Petitioner is now engaged in constructing a new steam-electric generating station at Chalk Point on the Patuxent River in the extreme southeasterly corner of Prince George's County, Maryland. The first generating unit at such station (having a net capability of 324,000 kilowatts) is to go into operation in the Spring of 1964 and a second, identical unit is to go into operation in the Spring of 1965.

8. In order to be able to connect said Chalk Point generating station with its electric system, the Petitioner has acquired substantially all of a 250 foot wide right-of-way extending from said Chalk Point generating station to its above-mentioned Burtonsville Substation No. 120. The locations of said generating station and said substation, and the course of said right-of-way, are shown on Exhibit A hereto. Said Exhibit A also shows the location, adjacent to said right-of-way, of the Freeway Airport at Mitchellville, Maryland, which is the airport referred to in the above-captioned Determination.

9. In September, 1956, the Petitioner secured an option on the Chalk Point generating station site and immediately began a study to fix the route to be followed by the right-of-way for the transmission lines needed to connect such station to the Petitioner's said Burtonsville Substation No. 120. By mid-1958 such route (including the portion of the right-of-way in the vicinity of said Freeway Airport) had been largely determined (using aerial photographs which gave no indication of any airport operation on the property which is now the site of said Freeway Airport), and by November 16, 1960 all but one of the necessary property acquisitions in the vicinity of such airport had been completed. The final such acquisition was completed on May 9, 1961.

10. Petitioner proposes to construct on said right-of-way two 230,000 volt, steel tower, double circuit transmission lines, with each of such towers having a height of approximately 125 feet above ground level and with the towers on each line to be located at intervals of approximately 1,000 feet.

11. The location, construction, maintenance and operation of said steel tower transmission lines, including the portions thereof in the vicinity of said Freeway Airport, is essential to the performance by the Petitioner of its public utility obligations, and essential to the furnishing of adequate electric service to the Washington Metropolitan Area, including the many governmental buildings, installations and facilities located therein.

12. Said Freeway Airport is a privately owned and operated airport used solely by light aircraft operated for private pleasure, sport and/or business.

13. The Form FAA-2681, seeking airspace clearance, filed with the Federal Aviation Agency by the owner and operator of said Freeway Airport was dated December 16, 1961 and indicated that such owner and operator was then aware of the Petitioner's proposed transmission line construction in the vicinity of the airport. The Petitioner was given no opportunity to be heard with respect to the propriety of granting such airspace clearance to such airport.

14. The above-captioned Determination finds "that the [Petitioner's] proposed structure would have a substantial adverse effect upon aeronautical operations at the Freeway Airport" and determines "that [such] proposed structure would be a hazard to air navigation", which said determination, if it should become final, might, conceivably, cast doubt upon the Petitioner's right to construct, maintain and operate said transmission lines or subject the Petitioner to liability in the event an aircraft, in the course of its use of said Freeway Airport, should come into con-

tact with essential public service facilities constructed and maintained by the Petitioner on its said 250 foot wide right-of-way in the vicinity of said airport.

15. The above-captioned Determination made no finding or determination as to what action should be taken for the protection of persons and property on the ground or as to what, in the public interest, would be the most efficient utilization of the navigable airspace above the Petitioner's said 250 foot wide right-of-way in the vicinity of said Freeway Airport, and in the making of said Determination no consideration was given to the large public interest affecting the Petitioner's operations as a public utility or to the essential public service nature of the facilities proposed to be constructed, maintained and operated by the Petitioner on its said right-of-way.

WHEREFORE, the Petitioner prays that a public hearing, under Subpart D of Part 626 of the Regulations of the Administrator, be conducted on the Petitioner's said proposed construction in order to determine, in the light of the over-all public interest, the effect of the proposed construction upon the safety of aircraft and, even more importantly, upon the efficient utilization of the navigable airspace.

Respectfully submitted,

POTOMAC ELECTRIC POWER COMPANY

By GEORGE BISSET,  
George Bisset,  
*Senior Vice President.*

Washington, D. C.  
November 16, 1962.

CORNELIUS MEANS,  
929 E Street, N. W.,  
Washington 4, D. C.  
*Attorney for Potomac Electric  
Power Company.*

DISTRICT OF COLUMBIA, SS.:

GEORGE BISSET, being first duly sworn on his oath, deposes and says that he is the Senior Vice President of Potomac Electric Power Company, the Petitioner named in the foregoing Petition, that he has read said Petition by him subscribed, that he knows the contents thereof, and that the matters and things therein stated he verily believes to be true.

GEORGE BISSET  
George Bisset

Subscribed and sworn to before me this 16th day of November, 1962. My Commission expires June 14, 1965.

[NOTARIAL SEAL]

INDIANA C. SHEPP,  
Indiana C. Shepp,  
*Notary Public, D. C.*

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BEFORE THE ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY

OE Docket No. 62-EA-4

In the Matter of

POTOMAC ELECTRIC POWER COMPANY

Determination of Hazard to Air Navigation

**Answer to Petition for Public Hearing**

Irvin R. Rodenhauser and Frances M. Rodenhauser, Church Road, Box 163, Mitchellville, Maryland, are the proprietors of the Freeway Airport, located at the intersection of John Hanson Highway and Church Road, Mitchellville, Maryland. They hereby make answer to the petition for public hearing filed herein on November 16, 1962 by the Potomac Electric Power Company:

1. The Rodenhauers do not object to a public hearing in this matter.

2. However, the petition for public hearing filed by the Potomac Electric Power Company does not show an adequate foundation for said petition, and such hearing should be denied until an adequate petition is filed; Section 626.34 of the Regulations of the Administrator. Section 626.12 provides that a proposed structure which would extend above certain specified criteria would ultimately be determined to be a hazard to air navigation unless, upon an aeronautical study of the structure under this part, the Agency finds that notwithstanding violation of criteria, such construction would not constitute a hazard. A preliminary study by the Agency indicated that the proposed transmission lines and supporting towers would exceed the hazard criteria of Part 626.12(a)(6) as applied to all of the runways of Freeway Airport. Further, the Agency determination of October 19, 1962 concludes that the proposed structures would render two of the three runways unusable, and would derogate the use of the third runway, and would have a substantial adverse effect on aeronautical operations at the Freeway Airport.

3. The proponent of the structures does not deny the result of the Agency's preliminary study, nor does it deny the conclusions of the Agency's determination of October 19, 1962. Unless in some way the proponent alleges that the results and conclusions reached by the Agency are in error, by alleging that the proposed structures would not violate any of the criteria of 626.12, or that notwithstanding violation of such criteria, such construction would not constitute a hazard, the petition for public hearing does not have adequate foundation, and the hearing should be denied.

4. The Rodenhausers would be prejudiced by the grant of a public hearing upon the present petition, for the reason that they presently contemplate becoming a party to any hearing that may be awarded, and in order for them to adequately meet the issues raised by the proponent it

J.A. 26

will be necessary for them to have some advance notice of what they will be.

Respectfully submitted,

s/ JOHN S. YODICE  
Armour, Herrick, Kneipple &  
Allen  
1001-15th St., N. W.  
Washington, D. C.  
*Attorneys for the  
Rodenhauers*

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**FAA Letter to Pepco, Dated February 1, 1963, Denying  
Petition for Public Hearing**

FEDERAL AVIATION AGENCY  
WASHINGTON 25, D.C.

February 1, 1963

OFFICE OF THE ADMINISTRATOR

Dear Mr. Bisset:

This is in reply to your petition dated November 16, 1962, for a public hearing with respect to the Agency's determination in OE Docket No. 62-EA-4.

We regret to inform you that our examination of this matter forces us to deny the petition for a hearing. The grounds given as the basis for obtaining a hearing and formal decision of the Administrator do not constitute adequate foundation for the granting of a hearing pursuant to Section 77.39(c)(New) of the Regulations.

J.A. 27

Accordingly, you are advised that your petition for public hearing may not be granted.

Sincerely,

HAROLD W. GRANT  
Harold W. Grant  
Lieutenant General, USAF  
Deputy Administrator

Mr. George Bisset  
Senior Vice President  
Potomac Electric Power Company  
929 E Street, N. W.  
Washington 4, D. C.

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17706

POTOMAC ELECTRIC POWER COMPANY, 929 E Street, N. W.,  
Washington 4, D. C., *Petitioner*,

vs.

N. E. HALABY, Administrator of the Federal  
Aviation Agency, *Respondent*.

**Petition for Review Under Sec. 1006(a) of the  
Federal Aviation Act of 1958**

*To the Honorable, the United States Court of Appeals for  
the District of Columbia Circuit:*

The Petitioner herein, Potomac Electric Power Company, a District of Columbia and Virginia corporation having its principal place of business at 929 E Street, N. W., Washington 4, D. C., and engaged in the generation, transmission and distribution to the public of electric power and energy in the Washington metropolitan area, hereby respectfully petitions this Honorable Court to review, pursuant to Sec. 1006(a) of the Federal Aviation

Act of 1958 [P.L. 85-726, August 23, 1958; 72 Stat. 795; U.S.C. Title 49, § 1486(a)], certain orders issued by, or under the authority of, the respondent Administrator of the Federal Aviation Agency (the "Administrator") as hereinafter set forth.

### I. NATURE OF PROCEEDINGS

1. The proceedings as to which review is sought were under Subparts A, B and C of Part 626 of Subchapter E of Chapter III of Title 14 of the Code of Federal Regulations, as such Subparts were in effect prior to December 12, 1962.\*

2. Such proceedings resulted in the issuance by the Acting Chief of the Obstruction Evaluation Branch of the Federal Aviation Agency, on October 19, 1962, allegedly pursuant to authority delegated to him by the Administrator, of a "Determination of Hazard to Air Navigation (OE Docket No. 62-EA-4)", determining that certain above-ground electric transmission facilities proposed to be constructed, operated and maintained by the Petitioner on its fee-owned real property would be a "hazard to air navigation" in respect of a certain privately owned and operated airport located adjacent to Petitioner's said real property. Said Determination made no provision for the payment of any compensation to the Petitioner. During the course of such proceedings, the Petitioner was given no opportunity to be heard as to the respective public interests to be served by its said facilities and by the air navigation related to said airport.

3. On November 16, 1962, being a date within 30 days of the date of issuance of said Determination, the Petitioner filed a petition with the Administrator for a public hearing for the purpose of obtaining a formal decision of the Administrator on the matter, as required by the Adminis-

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\* Effective December 12, 1962, Part 626 was deleted from Chapter III of Title 14, CFR, and in its place was substituted Part 77 of Subchapter E [New] of Chapter I of said Title 14.

trator's then effective regulations (14 CFR 626.34) in order to prevent said Determination from becoming final.

4. Subsequently, by letter dated February 1, 1963, the Petitioner was advised by the Deputy Administrator of the Federal Aviation Agency that such petition was denied. Under the provisions of § 77.37(b) of Part 77 of Subchapter E [New] of Chapter I of Title 14 of the Code of Federal Regulations said Determination became final upon the denial of such petition.

## II. VENUE

1. Sec. 1006(a) of the Federal Aviation Act of 1958 [P.L. 85-726, August 23, 1958; 72 Stat. 795; U.S.C. Title 49, § 1486(a)] provides that any order, affirmative or negative, issued by the Administrator under the Act (with one non-relevant exception) shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order.

2. Sec. 1006(b) of said Act [P.L. 85-726, August 23, 1958; 72 Stat. 795; U.S.C. Title 49 § 1486(b)] provides that the petition for review shall be filed in the court for the circuit where the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

## III. GROUNDS UPON WHICH RELIEF IS SOUGHT

The Petitioner asserts that, if said Determination could operate in any way to prejudice the Petitioner in its construction, operation and maintenance of said above-ground electric transmission facilities on its said fee-owned real property, or to impair or affect adversely any right or

rights which the Petitioner would otherwise have in connection with its said use of said property, then:

(a) The Administrator lacks statutory authority to make said Determination.

(b) If such statutory authority be found to exist, its said exercise by the Administrator, without the payment of just compensation to the Petitioner, is an unlawful exercise of said statutory authority as constituting a taking of the property of the Petitioner for public use in violation of the Fifth Amendment to the Constitution of the United States.

(c) If such statutory authority be found to exist and if it may, constitutionally, be exercised by the Administrator without the payment of just compensation to the Petitioner, it may be exercised by the Administrator only (i) after the Petitioner has had an opportunity to present evidence as to the respective public interests to be served by its said facilities and by said air navigation, and (ii) upon the basis of appropriate findings by the Administrator as to the efficient utilization of the navigable airspace, which findings are supported by, among other things, substantial evidence of record that the public interest to be served by said air navigation is superior to the public interest to be served by the Petitioner's said facilities.

WHEREFORE, the Petitioner prays that review of said proceedings be granted and that, upon such review, an appropriate order be entered either (i) dismissing this Petition on the ground that said Determination cannot operate in any way to prejudice the Petitioner in its said use of its said fee-owned real property, or to impair or affect adversely any right or rights which the Petitioner would otherwise have in connection with its said use of said property; or (ii) setting aside said Determination and dismissing said proceedings; or (iii) setting aside said letter order of February 1, 1963, directing that the

Petitioner be granted a public hearing at which it may present evidence as to the respective public interests to be served by its said proposed facilities and by said air navigation, and directing the Administrator, in making his final determination, to make appropriate findings, in the light of, among other things, such evidence, on the efficient utilization of the navigable airspace.

Respectfully submitted,

POTOMAC ELECTRIC POWER COMPANY

By S. R. WOODZELL

S. R. Woodzell

*Senior Vice President*

Washington, D. C.,  
March 15, 1963.

CORNELIUS MEANS

Cornelius Means

929 E Street, N. W.,  
Washington 4, D. C.,

*Attorney for the Petitioner*

J.A. 32

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,706

POTOMAC ELECTRIC POWER COMPANY, *Petitioner*

v.

N. E. HALABY, Administrator of the Federal Aviation  
Agency, *Respondent*

---

ON PETITION FOR REVIEW OF AN ORDER OF THE ADMINISTRATOR  
OF THE FEDERAL AVIATION AGENCY

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Stipulation of Issues and Schedule for Designation of Record  
and Briefing

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1. Pursuant to Rule 38(g) of this Court, it is hereby stipulated and agreed by counsel for the Potomac Electric Power Company and the Federal Aviation Agency, that the material issues presented by this petition are:

- a. Whether this Court has jurisdiction to review the determination by the Federal Aviation Administrator that the proposed construction of power lines by Potomac Electric Power Company on property abutting the Freeway Airport would constitute a hazard to air navigation.
- b. Whether the Administrator has statutory authority (a) to make a determination that a proposed structure would be a hazard to air navigation, and (b) to do so without providing for just compensation.
- c. Assuming that the Administrator has such authority, whether it may be exercised without affording the

petitioner an opportunity to present evidence as to the respective public interests involved in the airport and in petitioner's power lines, and without the Administrator making findings in the light thereof as to the efficient utilization of the navigable airspace.

2. It is further stipulated and agreed that the designations for printing shall be served, and the briefs filed, according to the following schedule:

- a. Petitioner shall serve a designation of portions of the record for printing in the joint appendix on or before May 16, 1963.
- b. Respondent (and intervenor, if any) shall serve a designation of any additional portion of the record for printing on or before May 23, 1963.
- c. Petitioner's brief and the joint appendix shall be due on or before June 17, 1963.
- d. Respondent's (and intervenor, if any) brief shall be due on or before July 26, 1963.
- e. Petitioner's reply brief, if any, shall be due on or before August 15, 1963.

LIONEL KESTENBAUM  
Department of Justice  
Washington 25, D. C.  
*Attorney for Respondent*

CORNELIUS MEANS  
Potomac Electric Power Company  
929 E Street, N. W.  
Washington, D. C.  
*Attorney for Petitioner*

J.A. 34

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 17,706

POTOMAC ELECTRIC POWER COMPANY

v.

N. E. HALABY

Before: FAHY, Circuit Judge, in Chambers.

**Prehearing Order**

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: May 13, 1963

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,706

POTOMAC ELECTRIC POWER COMPANY, 929 E Street, N. W.,  
Washington 4, D. C., *Petitioner*

vs.

N. E. HALABY, Administrator of the Federal Aviation  
Agency, *Respondent*

**Motion of Irvin R. and Frances M. Rodenhauser for  
Leave to Intervene**

Now comes Irvin R. and Frances M. Rodenhauser (hereinafter called the Rodenhauers), pursuant to Rule 38 (f) of the Court's Rules, to move the Court for leave to intervene in the above-entitled case, and for grounds states as follows:

1. The Rodenhauers reside at Church Road, Box 163, Mitchellville, Maryland, and are the proprietors of the Freeway Airport, located at the intersection of John Hanson Highway and Church Road, Mitchellville, Maryland.

2. The petitioner proposes to construct, operate and maintain certain above-ground electric transmission facilities on its fee-owned real property which is adjacent to Freeway Airport.

3. Certain administrative proceedings concerning the petitioner's proposal were had before the Federal Aviation Agency, and the Rodenhauers because of their interest were a party to these proceedings. The proceedings resulted in the issuance by the Acting Chief of the Obstruction Evaluation Branch of the Federal Aviation Agency, on October 19, 1962, pursuant to authority delegated to him by the Administrator, of a "Determination of Hazard to Air Navigation (OE Docket No. 62-EA-4)," determining that the petitioner's proposed transmission facilities, if

erected, would constitute a hazard to air navigation in that they would render two of the runways at Freeway Airport unusable, would derogate the use of the third runway, and would have a substantial adverse effect upon aeronautical operations at the Freeway Airport. Petitioner's request to the Administrator for a public hearing for the purpose of obtaining a formal decision of the Administrator on the matter was denied.

4. The Rodenhauers, as owners of Freeway Airport, have a substantial interest in all of the matters raised by the petitioner in this appeal. While it may be that the interest of the Rodenhauers is the same or similar to the interest of the Administrator and, therefore, may be represented by the Administrator in this appeal, the Rodenhauers have no assurance of this.

WHEREFORE, the Rodenhauers move the Court for leave to intervene and participate as a party in the above-entitled case.

Respectfully submitted,

JOHN S. YODICE  
John S. Yodice  
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Washington, D. C.

MERRILL ARMOUR  
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*Attorneys for the Rodenhauers*

J.A. 37

Filed Jun. 3, 1963

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,706

September Term, 1962

POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

v.

N. E. HALABY, Administrator, Federal Aviation Agency,  
*Respondent.*

Before: Fahy, Danaher and Wright, Circuit Judges, in  
Chambers.

**Order**

On consideration of the unopposed motion of Irvin R. and Frances M. Rodenhauser for leave to intervene, it is

ORDERED by the court that Irvin R. and Frances M. Rodenhauser are hereby granted leave to intervene and to file a single brief in this case.

Per Curiam.

Dated: Jun. 3, 1963

REPLY BRIEF AND SUPPLEMENTARY APPENDICES  
FOR PETITIONER

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,706

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POTOMAC ELECTRIC POWER COMPANY, *Petitioner*,

v.

N. E. HALABY, Administrator of the Federal Aviation  
Agency, *Respondent*

(IRVIN R. and FRANCES M. RODENHAUSER, *Intervenors*).

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On Petition for Review of an Order of the Administrator  
of the Federal Aviation Agency

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United States Court of Appeals

for the District of Columbia Circuit

FILED SEP 10 1963

*Nathan J. Paulson*  
CLERK

September 10, 1963

CORNELIUS MEANS

THOMAS E. O'DEA

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Washington 4, D. C.

*Attorneys for the Petitioner*

## TABLE OF CONTENTS

	Page
THE POSITIONS OF THE PARTIES .....	1
CONCLUSION .....	7
APPENDIX A—Table of FAA determinations of hazard to air navigation published in Federal Register between July 15, 1961 and August 31, 1963 .....	8
APPENDIX B—FAA determination of hazard to air navigation <i>in re</i> Pacific Gas and Electric Co., July 23, 1963, 28 F.R. 7681 .....	9

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 17,706

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POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

v.

N. E. HALABY, Administrator of the Federal Aviation  
Agency, *Respondent*

(IRVIN R. and FRANCES M. RODENHAUSER, *Intervenors*).

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On Petition for Review of an Order of the Administrator  
of the Federal Aviation Agency

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REPLY BRIEF AND SUPPLEMENTARY APPENDICES  
FOR PETITIONER

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## THE POSITIONS OF THE PARTIES\*

In its Petition for Review Pepco asks, as an alternative remedy, that an appropriate order be entered by this Court dismissing the Petition on the ground that the Ad-

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\* While Pepco does not think it necessary to discuss the Respondent's "Counter-Statement of the Case" (Respondent's Brief 1-6), it does wish to note that (i) it has never admitted that the Intervenors' airport "has been in operation since 1942 or 1946" but has never been given an opportunity to submit evidence to the contrary, and (ii) Note 5 on page 6 of the Respondent's Brief is in error in stating that Pepco asked the Prince George's County Circuit Court for an injunction. The only relief sought in the action was a declaratory judgment.

ministrator's Determination cannot adversely affect Pepco (JA 30). And in its principal brief Pepco says, at page 16, that it is convinced, in the light of the lack of authority in the Administrator to control the use of airspace by non-aeronautical interests (as made clear in such brief), that

"Since the Administrator is primarily concerned with the safety of the flying public and since he must be presumed to be aware of his lack of authority over non-aeronautical uses of the airspace . . . , the Determination [was] intended simply as a factual finding of a potential hazard to flying operations at Freeway Airport which, when it becomes a reality, will have to be recognized by the Intervenor proprietors of the airport in determining whether to continue to use the affected runways and thus expose their users to the risks inherent in the existence of the hazard." (Petitioner's Brief 15)

The Respondent Administrator, in his brief, takes the position that

"... The FAA determination is a declaration that the structure is not compatible with air navigation safety requirements but does not purport to prohibit the erection or alteration of the structure. ..." (Respondent's Brief 7)

Further, the Administrator says that he "does not purport to choose between the competing aeronautical and non-aeronautical uses" (Respondent's Brief 14) and that the Determination

"... did not purport to construe [Secs. 101(24) (PA 4), 104 (PA 5) and 307(a) (PA 8) of the Act] or pass upon the respective rights of the airport and Pepco against each other. ..." (Respondent's Brief 20)

Accordingly, the Administrator asks that the Petition be dismissed, as non-reviewable.

Finally, the intervenor proprietors of the airport file no brief of their own, but simply adopt the Administrator's brief, saying that they "are satisfied that [it] adequately states" their position.

Thus, the parties are in apparent agreement that the Petition should be dismissed. However, from the standpoint of Pepco it is essential that such dismissal be accompanied and explained by an opinion of the Court adjudicating (i) that the Determination is merely a finding of fact by the Administrator that for aircraft to fly through, or in dangerous proximity to, the airspace occupied by the structures and wires which Pepco proposes to erect on its property will be hazardous, both for the aircraft and for such Pepco facilities; (ii) that the Determination in no way constitutes a finding or holding by the Administrator that the use of such airspace, by aircraft landing or taking off at Freeway Airport, is the preferred or "efficient" use thereof; and (iii) that the Determination did not operate to "assign" the use of such airspace within the meaning of Sec. 307(a) of the Act (PA 8).

It is submitted that the position taken by the Administrator in his brief and adopted by the Intervenor provides full warrant for such an adjudication by the Court, particularly in the context of Pepco's arguments, in its principal brief, as to the lack of power in the Administrator to deprive Pepco of its rights as a landowner, which arguments neither the Administrator nor the Intervenor have seen fit to attempt to answer. And if the Court should merely dismiss the Petition without supporting the dismissal by such an adjudication as to the meaning and effect of the Determination, Pepco would be exposed to

the possibility of a future interpretation of such meaning and effect contrary to the position taken in the Administrator's brief and adverse to Pepco's rights as the owner of its transmission line real property.\*

Although the parties are thus in apparent agreement that the Petition should be dismissed because the Determination cannot affect Pepco adversely, this Court still has before it, of course, the task of ascertaining the true meaning and effect of the Determination. As a possible aid to the Court in so doing, we offer the following brief analysis of what appears to us to be the salient point at issue:

1. The Determination was issued pursuant to Part 626 of the Administrator's Regulations, the preamble to which says that "the Act authorizes and directs the Administrator to regulate the use of the navigable airspace in order to insure aircraft safety and efficient utilization" (PA 21). Part 626 assigns as the authority for its issue Secs. 104 (PA 5), 307 (PA 8), 313 (PA 11), 1001 (PA 13), and 1101 (PA 16) of the Act. The only one of such sections that uses the term "efficient utilization" of airspace is Sec. 307.

2. Sec. 307 directs the Administrator "to assign by rule, regulation, or order the use of the navigable airspace under such terms . . . as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace".

---

\* As to this possibility, the Respondent merely states that "Certainly a court in any future case will not be bound by the 'determination' in construing the . . . Act . . ." (Respondent's Brief 20). The difficulty, as we see it, is that if this Court should dismiss the Petition without an adequate adjudication as to the meaning and effect of the Determination, a court in some subsequent case might consider the dismissal to have affirmed the Determination as a final decision by the Administrator that the use by aircraft of the airspace superjacent to Pepco's property is the "efficient utilization" of such airspace and to have foreclosed any collateral attack on the power of the Administrator to make such a determination.

3. § 626.1 of Part 626 says that one of the purposes of the Part is "to determine the effects of . . . structures [which would exceed the criteria in Part 626] upon the safety of aircraft in flight and the efficient utilization of airspace" (PA 24), and § 626.2 defines "Determination" to mean "a decision . . . as to the effect upon air navigation of a specific construction proposal, from an airspace utilization standpoint" (PA 25).

4. The opening paragraph of the Determination states that the FAA "has conducted a study to determine [the] effect [of the proposed Pepco construction] upon the safe and efficient utilization of airspace" (JA 17).

5. In its principal brief Pepco argues, among other things, that the Determination is defective because, although apparently issued under the authority of Sec. 307(a) of the Act (PA 8), it contains no finding as to the "efficient utilization" of the airspace (Petitioner's Brief 38).

6. In his brief the Administrator argues, presumably relying on the absence from the Determination of an express finding as to "efficient utilization," that the Determination "did not purport to construe these statutory provisions [referring to Secs. 104 and 307(a) of the Act] or pass upon the respective rights of the airport and Pepco against each other" (Respondent's Brief 20).

7. Thus, the Administrator seizes upon the absence from the Determination of what appears to Pepco to be an essential finding, as the ground for his argument that the Determination is not an attempted assignment of the use of airspace under Sec. 307(a) of the Act (PA 8) and hence is not reviewable. This, we submit, is the basic issue before the Court—was the Determination an attempt to "assign" the use of airspace within the meaning of Sec. 307(a) which was invalid for the numerous reasons given in Pepco's principal brief, or was it simply a wholly unnecessary "finding of the physical fact that a 125 foot tall tower occupying airspace through which an airplane must

fly will be a hazard to the flight of such airplane" (Petitioner's Brief 42)?

8. As casting possible light upon this issue, we point out that between the effective date of Part 626 and August 31, 1963, a total of 43 determinations of hazard to air navigation were published by the Administrator in the Federal Register.\* Each of such determinations contained, in its opening paragraph, language similar to that found in our Determination, i.e., that the FAA had conducted a study to determine the effect of the proposed construction upon the safe and efficient utilization of airspace. Fifteen of such determinations (including the one involved in this case), made no express finding as to the efficient utilization of airspace, but the remaining 28 of such determinations each contained a finding that the proposed construction would have a substantial adverse effect upon the efficient utilization of airspace. A recent example of such latter type of determination, in a situation apparently almost identical to that involved here, is attached hereto as Appendix B.

Since it is not reasonable to suppose that the Administrator intentionally makes two different kinds of determinations to be applied to substantially identical situations—one of which is intended merely to point out the physical incompatibility of two competing airspace uses and the other of which is intended to decide what is the "efficient utilization" of the airspace, it is possible that this Court might consider the Determination here involved to be intended as an assignment of airspace use despite its apparently inadvertent omission of an express finding as to efficient utilization.

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\* The respective Federal Register citations are given in Appendix A hereto.

**CONCLUSION**

Regardless of the intent of the Administrator in issuing the Determination, it is clear, as Pepco says in its principal brief (p. 18),

“... that the general tenor of the Determination, and the Regulations under which it is issued, is such as to suggest to the reader that the proposed structures have been outlawed”.

Such being the case, this Court, in response to Pepco's Petition for Review, should make clear either that the Determination can have no such effect or that, having such effect, it is beyond the statutory and constitutional powers of the Administrator.

Respectfully submitted,

CORNELIUS MEANS  
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*Attorneys for the Petitioner.*

Washington, D. C.

September 10, 1963

## APPENDIX A

FAA Determinations of Hazard to Air Navigation  
Published in Federal Register between July 15, 1961 and  
August 31, 1963

Containing Finding as to Efficient Utilization of Airspace	Containing No Finding as to Efficient Utilization of Airspace
27 F.R. 10594	26 F.R. 10105
27 F.R. 10972	26 F.R. 10107
27 F.R. 11027	26 F.R. 10248
27 F.R. 12987	26 F.R. 10373
28 F.R. 359	26 F.R. 10944
28 F.R. 1747	27 F.R. 2938
28 F.R. 2248	27 F.R. 3016
28 F.R. 2511*	27 F.R. 7464
28 F.R. 2512	27 F.R. 7580
28 F.R. 2537	27 F.R. 9665
28 F.R. 3426	§27 F.R. 10593
28 F.R. 3792	27 F.R. 11026
28 F.R. 4041	27 F.R. 11241
28 F.R. 4593	28 F.R. 1748
28 F.R. 5539	28 F.R. 4593
28 F.R. 5692	
28 F.R. 6982	
28 F.R. 6838	
28 F.R. 7108	
28 F.R. 7403*	
†28 F.R. 7681	
28 F.R. 8476	
28 F.R. 9447	
28 F.R. 9544*	
28 F.R. 9545	

\* Two determinations are printed on this page.

† This determination is printed in Appendix B.

§ This is the Determination involved in this case.

## APPENDIX B

[28 F.R. 7681]

FEDERAL AVIATION AGENCY

[OE Docket No. 63-WE-5]

PACIFIC GAS AND ELECTRIC CO.

## Determination of Hazard to Air Navigation

The Federal Aviation Agency has circularized the following proposal for aeronautical comment and has conducted a study (4-OE-2237) to determine its effect upon the safe and efficient utilization of navigable airspace.

The Pacific Gas and Electric Company, San Francisco, California, proposes to construct a 12,000-volt transmission line near Meadowlark Field, an airport with a single runway 1,700 feet in length at Livermore, California. In the vicinity of the airport, the line would be supported by six wooden poles aligned from north to south for a distance of approximately 805 feet, then west to east for a distance of approximately 440 feet near latitude  $37^{\circ}39'40''$  N., longitude  $121^{\circ}41'45''$  W., at an overall height of 760 feet above mean sea level, 30 feet above ground. The north/south portion of the line would cross the extended runway centerline of Meadowlark Field at a distance of 105 feet west of the west end of the runway, and would exceed the standards contained in §§ 77.27(b)(3) and (c)(3)(iii) of the Federal Aviation Regulations by 23 and 22 feet, respectively.

The transmission line would reduce the effective length of the runway to approximately 1,200 feet, an unsafe length, and would virtually eliminate use of Meadowlark Field as an emergency field. This airport is located in the most fogfree area of the San Francisco bay area. Accordingly, it is the finding of the Agency the proposed construction would have a substantial adverse effect upon aeronautical operations at Meadowlark Field.

Therefore, pursuant to the authority delegated to me by the Administrator (§ 77.37 [New]), *it is found that the proposed transmission line would have a substantial adverse effect upon the safe and efficient utilization of navigable airspace*; and it is hereby determined that the proposed structure would be a hazard to air navigation [emphasis supplied].

This determination is effective as of the date of issuance and will become final 30 days thereafter unless an appeal is filed under § 77.39 [New] (27 F.R. 10352). If the appeal is denied, the determination will then become final as of the date of the denial or 30 days after the issuance of the determination, whichever is later.

Issued in Washington, D.C., on July 23, 1963.

RALPH H. FLETCHER,  
*Acting Chief,*  
*Obstruction Evaluation Branch.*

[F.R. Doc. 63-7899; Filed, July 26, 1963; 8:45 a.m.]

